86-939

No. 86-

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENERGY TRANSPORTATION SYSTEMS INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4544
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly substituted its own view for that of the Secretary of the Interior concerning the appropriate construction of the Flood Control Act of 1944.

2. Whether the Secretary of the Interior is authorized under the Flood Control Act of 1944 to contract for the beneficial use of irrigation water stored in the main stem reservoirs of the Missouri River Basin.

LIST OF PARTIES

The following parties were plaintiffs in the District Court and appellees in the Eighth Circuit on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944: the States of Missouri, Iowa and Nebraska, Kansas City Southern Railway Company, The Sierra Club and the Nebraska, Iowa and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America.

The following parties were defendants in the District Court and appellants in the Eighth Circuit* on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944: Energy Transportation Systems Inc.; Colonel William R. Andrews, Jr. [Steven G. West], District Engineer, Omaha District, United States Army Corps of Engineers; Brigadier General Mark J. Sisinyak [Charles E. Dominy], Division Engineer, Missouri River Division, United States Army Corps of Engineers, Omaha, Nebraska; Lieutenant General J. K. Bratton [E. R. Hieberg, III], Chief of Engineers, United States Army Corps of Engineers; John O. Marsh, Jr., Secretary of the Army; Joseph B. Marcotte, Jr., Regional Director, Upper Missouri Region, Bureau of Reclamation; Robert N. Broadbent [C. Dale Duvall], Commissioner, Bureau of Reclamation; Maxwell T. L. Lieurance, Wyoming State Director, Bureau of Land Management; Robert F. Burford, Director, Bureau of Land Management; Garrey E. Caruthers [Wayne N. Marchant], Assistant Secretary of the Department of the Interior for Land and Water Resources [Assistant Secretary of the Department of the Interior for Water and Science]; James G. Watt [Donald P. Hodel], Secretary of the United States Department of the Interior; Craig W.

---

*Where the named parties have changed, the new names are included in brackets. Similarly, where the title of a position has changed, the new title is in brackets.

Rupp, Regional Forester, Region II, (Rocky Mountain Region), United States Forest Service; R. Max Peterson, Chief, United States Forest Service; John R. Block [Richard E. Lyng], Secretary of the United States Department of Agriculture; Anne M. Gorsuch [Lee M. Thomas], Administrator, Environmental Protection Agency.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	18
1. The Decision Below Threatens the Strong Federal Interest in Efficient, Beneficial Use of the Nation's Water Resources	18
2. The Decision Below Jeopardizes the Rights of the States to Control Water Uses Within Their Borders	22
3. The Decision Below Directly Conflicts with Decisions of This Court Requiring Judicial Deference to Reasonable Agency Constructions of Their Enabling Statutes	24
CONCLUSION	30
APPENDICES	
APPENDIX A	
Opinion of the United States Court of Appeals for the Eighth Circuit	1a

TABLE OF CONTENTS—Continued

Page

APPENDIX B

Opinion of the United States District Court for the District of Nebraska 45a

APPENDIX C

Judgment of the United States Court of Appeals for the Eighth Circuit 73a

APPENDIX D

Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearings by the Panel and *en banc* 74a

APPENDIX E

Flood Control Act of 1944, Pub. L. No. 78-534, ch. 665 ..... 76a

TABLE OF AUTHORITIES

CASES	Page
Arizona v. *California*, 373 U.S. 546 (1963)	24
Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983)	29
California v. *United States*, 438 U.S. 645 (1978)	24
Chemical Manufacturers Ass'n v. *Natural Resources Defense Council, Inc.*, 470 U.S. 118 (1985)	25, 27
Chevron U.S.A. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	25-29
Colorado v. *New Mexico*, 467 U.S. 310 (1984)	24
Commodity Futures Trading Comm'n v. *Schor*, 106 S. Ct. 3245 (1986)	25, 28, 29
Connecticut Dep't of Income Maintenance v. *Heckler*, 471 U.S. 524 (1985)	25
Environmental Defense Fund v. *Andrus*, 596 F.2d 848 (9th Cir. 1979)	12
Federal Deposit Ins. Corp. v. *Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986)	25, 27
Nebraska v. *Wyoming*, 325 U.S. 589 (1945)	24
Rogers v. *Lodge*, 458 U.S. 613 (1982)	17
Schor v. *Commodity Futures Trading Comm'n*, 740 F.2d 1262 (D.C. Cir. 1984), *rev'd*, 106 S. Ct. 3245 (1986)	28
South Dakota v. *Nebraska*, 106 S. Ct. 1487 (1986)	7
Sporhase v. *Nebraska*, 458 U.S. 941 (1982)	24
United States v. *City of Fulton*, 106 S. Ct. 1422 (1986)	25, 27
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950)	24
United States v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985)	25, 27, 28-29
Washington Metropolitan Transit Authority v. *Johnson*, 467 U.S. 925 (1984)	17
Young v. *Community Nutrition Institute*, 106 S. Ct. 2360 (1986)	25

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS

Flood Control Act of 1944
Section 1, 33 U.S.C. § 701-1 (1982) 8, 9, 22-23
Section 6, 33 U.S.C. § 708 (1982) 19-20
Section 9, Pub. L. No. 78-534, 57 Stat. 887 ..... *passim*
Reclamation Act of 1902
43 U.S.C. § 391 8
Reclamation Project Act of 1939
Section 9, 43 U.S.C. § 485h (1982) 12, 14
Reclamation Reform Act of 1982
Section 212, 43 U.S.C. § 390*ll* (1982) 15-16
Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 319 (codified as amended at 43 U.S.C. § 390b (1982)) 20
WEB Rural Water Development Project Act of 1982, Pub. L. No. 97-273, §§ 3a and 4, 96 Stat. 1181, 1182 12
Corps of Engineers Project Planning Guidance, Regulation ER 1105-2-20, section 7-3(c) (Jan. 29, 1982) 20

CONGRESSIONAL MATERIALS

Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944) 18-19, 21
Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works, 85th Cong., 1st Sess., Part 2 (1957) 19
Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources, Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., Part 1 (1975) 9, 14, 20, 21, 23
H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944) 9, 10, 11, 21
S. Doc. No. 191, 78th Cong., 2d Sess. (1944) 9, 11, 18, 21
S. Doc. No. 247, 78th Cong., 2d Sess. (1944) 10, 11, 12, 21

TABLE OF AUTHORITIES—Continued

Page

S. Rep. No. 1066, 84th Cong., 1st Sess. (1955) 13
S. Rep. No. 373, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 2570 22
90 Cong. Rec. 4133 (1944) 20
128 Cong. Rec. S8476 (daily ed. July 16) 15
128 Cong. Rec. S8478 (daily ed. July 16, 1982) 15-16
128 Cong. Rec. S8480 (daily ed. July 16, 1982) .. 12, 16, 22
128 Cong. Rec. S11305 (daily ed. Sept. 10, 1982) .. 23
128 Cong. Rec. S11308 (daily ed. Sept. 10, 1982) .. 23

OTHER AUTHORITIES

M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan* (1955) 8, 9, 10, 21
Memorandum for the Chief Office of Civil Functions, United States Army Corps of Engineers (Dec. 16, 1974) 14, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

ENERGY TRANSPORTATION SYSTEMS INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Energy Transportation Systems Inc. ("ETSI") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Pet. App. 1a) are reported at 787 F.2d 270. The opinion of the District Court (Pet. App. 45a) is reported at 586 F. Supp. 1268.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 73a) was entered on March 13, 1986. The petition for rehear-

ing and suggestion of rehearing *en banc* were denied by order dated July 10, 1986 (Pet. App. 74a). On September 30, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including December 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Flood Control Act of 1944, 33 U.S.C. § 701-1 (1982), provides in part:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers . . . .
>
> In conformity with this policy:
>
> * * * *
>
> (b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partially west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Section 9 of the Flood Control Act of 1944,[1] Pub. L. No. 78-534, ch. 665, 58 Stat. 887, provides in part:

---

[1] All pertinent provisions of the Flood Control Act of 1944 are reprinted in the Appendix to this petition (Pet. App. 76a).

(a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

* * * *

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388 [43 U.S.C. §§ 372 *et seq.*] and Acts amendatory thereof or supplementary thereto) . . . .

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1982), provides in part:

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That . . . [n]o contract relating to municipal water supply or miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

Section 212 of the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll* (1982), provides:

(a) Applicability of Federal reclamation laws

Notwithstanding any other provision of law, neither the ownership or pricing limitation provisions nor the other provisions of Federal reclamation law, including this subchapter, shall be applicable to lands receiving benefits from Federal water resources projects constructed by the United States Army Corps of Engineers, unless—

(1) the project has, by Federal statute, explicitly been designated, made a part of, or integrated with a Federal reclamation project; or

(2) the Secretary, pursuant to his authority under Federal reclamation law, has provided project works for the control or conveyance of an agricultural water supply for the lands involved.

(b) Payment of construction, operation, maintenance and administrative costs allocated to conservation or irrigation storage

Notwithstanding any other provisions of this section to the contrary, obligations that require water users, pursuant to contracts with the Secretary, to repay the share of construction costs and to pay the share of the operation and maintenance and contract administrative costs of a Corps of Engineers project which are allocated to conservation storage or irrigation storage shall remain in effect.

STATEMENT OF THE CASE

A. Introduction.

Petitioner ETSI received a permit from the State of South Dakota and, thereafter, a contract from the Secretary of the Interior, authorizing ETSI to use for industrial purposes irrigation water stored in Lake Oahe, a main stem reservoir of the Missouri River. Narrowly stated, this litigation concerns the statutory authority of the Secretary to enter such a contract for the use of water stored in a reservoir operated by the United States Army Corps of Engineers ("Corps").[2] The court below held that the Secretary has no such authority.

---

[2] The main stem reservoirs are those built by the Corps along the main channel of the Missouri River. In addition, there is a network of approximately ninety smaller reservoirs built by the Bureau of Reclamation of the Department of the Interior on the tributary streams of the Missouri.

As is explained in this petition, however, much more is involved here than the validity of ETSI's single contract with the Secretary. For in striking down that contract, the court below effectively determined that virtually none of the vast amounts of water stored in the six Corps-operated main stem reservoirs in the arid States of the Upper Missouri Basin [3] may be made available for *any* beneficial consumptive use whatever. This determination not only deprives that region of access to vitally needed water, it also thwarts the federal interests in maximizing the beneficial use of water stored in federal reservoirs and in recouping the storage costs from private parties who can use the water. Moreover, the decision completely overrides the rights of the States—such as South Dakota in the present case—to control the use of waters within their borders. All of these results are plainly contrary to the delicate balancing of federal and state interests devised by Congress in the Flood Control Act of 1944.

Furthermore, and perhaps most significantly, in striking down ETSI's contract with the Secretary, the court below rejected out of hand the long-standing and jointly-held position of the two agencies charged with execution of the Flood Control Act: the Department of the Interior and the Corps. The court took this step notwithstanding Congress' implicit adoption of those agencies' construction of the Act and this Court's repeated instructions to the lower courts to defer to such agency constructions. For all these reasons, as more fully explained below, this case warrants the Court's review.

B. ETSI's Contract.

In 1981, ETSI obtained a water use permit from South Dakota permitting it to appropriate 50,000 acre feet of water per year out of Lake Oahe, which is located

---

[3] The Upper Missouri Basin includes the States of South Dakota, North Dakota, Montana, Colorado and Wyoming. The Lower Basin includes the States of Iowa, Nebraska, Kansas and Missouri.

entirely within South Dakota. ETSI intended to transport the water by aqueduct to the Powder River Basin in Wyoming to be mixed with coal, and then to move the slurry mixture through a coal slurry pipeline to coal-fired power plants in the southeastern United States. As a condition of the South Dakota permit, the State required ETSI to deliver water to several South Dakota communities along the pipeline route that lack adequate supplies of potable water. ETSI also promised not to exercise its rights under a Wyoming permit to withdraw water from the Madison Formation Aquifer, an important water source for both Wyoming and South Dakota.

Armed with its state water use permit, ETSI petitioned the Secretary of the Interior for a forty-year water service contract permitting it to withdraw 20,000 acre feet of water per year from Lake Oahe. After consultation with the Corps, the Secretary of the Interior approved the contract, relying on his authority under Section 9 of the Flood Control Act.[4] The Corps then issued a permit allowing ETSI to construct a water intake structure to remove the water from Oahe.

---

[4] Section 9(a), discussed further below, provides that:

> The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

Section 9(c), also discussed below, provides in pertinent part that:

> Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws . . . .

The States of Iowa, Missouri and Nebraska, the Kansas City Southern Railway, several farmers groups and the Sierra Club filed suit against ETSI, the Secretary and the Corps in the United States District Court for the District of Nebraska, challenging the federal permits and approvals. One of the plaintiffs' many allegations was that the Secretary of the Interior did not have authority under the Flood Control Act to enter the contract with ETSI.[5] Because the lower courts accepted this contention and because the Secretary's authority forms the centerpiece of this petition, it is important next to describe the source of that authority.

---

[5] Significantly, the plaintiff States did not challenge the water permit issued by South Dakota, although the relief they sought would effectively preclude South Dakota from realizing the benefits of that permit. South Dakota therefore sought, but was denied, leave to intervene in this action. It participated in both the District Court and the Eighth Circuit as amicus curiae.

Furthermore, after the District Court struck down its contract with ETSI, South Dakota moved for leave to file an original action in this Court against the plaintiff States in this case. *South Dakota v. Nebraska, Iowa and Missouri*, No. 103 Original (filed Aug. 16, 1985). Filing as amicus in response to South Dakota's motion, the United States acknowledged that the present case "actually presents a dispute with South Dakota over the use and allocation" of waters impounded within the borders of that State and, thus, entails an interstate conflict. Brief for the United States as Amicus Curiae at 11 (Feb. 1986). Nevertheless, the United States suggested that equitable and prudential considerations favored withholding a decision on South Dakota's motion for leave to file an original action because the present case might "resolve the present dispute or serve to sharpen the focus of the controversy." *Id.* On March 31, 1986, this Court denied South Dakota's motion without prejudice. 106 S. Ct. 1487 (1986).

Following the Eighth Circuit decision in the case, South Dakota renewed its motion for leave to file a complaint in this Court. That motion is currently pending.

C. The Secretary's Authority Under the Flood Control Act of 1944.

The Secretary of the Interior approved the ETSI contract pursuant to Section 9 of the Flood Control Act of 1944 (the "Act").[6] That Act authorized a nationwide program for the development of the country's water resources and the promotion of economic growth in the post-World War II years.[7] Two key compromises underlie the inclusion of the Missouri River Basin in this program.[8] These compromises, enacted as Sections 1(b) and 9 of the Act, resolved two sets of conflicts—one between the States of the Upper and Lower Missouri River Basin, the other between the Bureau and the Corps. Both compromises clarify the role that Congress intended the Secretary to play in administering the Act's program in the western States.

The first compromise was between the States. The Upper Basin States had interests roughly parallel to the Bureau's. These arid or semi-arid States, which lie largely west of the ninety-eighth meridian, sought to develop the Missouri River for irrigation and other beneficial consumptive water uses. The Bureau is charged with promoting agriculture and other economic development in the seventeen arid western States, including those in the Upper Basin.[9] It therefore planned a system of main stem and tributary dams, formalized for

---

[6] Pub. L. No. 78-534, 57 Stat. 887.

[7] M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan* 71-72 (1955) (hereinafter "*Ridgeway*").

[8] The Missouri Basin encompasses one-eighth of the land mass of the United States. *Id.* at 47.

[9] *See* 43 U.S.C. § 391 (1982).

Congress in the Sloan Report,[10] which was designed to further the Bureau's and the Upper Basin States' interests in the Basin. *See Ridgeway* at 83-86.

By contrast, the Lower Basin States' interests were more congruent with those of the Corps. These States had suffered years of devastating floods along the Missouri; they sought the expertise of the Corps in regulating the flow of the river. They also shared the Corps' interest in enhancing the navigability of the Missouri. Consistent with these interests, therefore, the Corps devised a plan, presented to Congress as the Pick Report,[11] geared towards flood control and navigation. *See Ridgeway* at 78-79.

Both the Upper and the Lower Basin States feared that the other's interests would preempt their own when the Basin was developed. Similarly, neither the Bureau nor the Corps was willing to cede control over the region to the other agency. A long and contentious debate in Congress was the result. Congress' compromise of the States' interests was Section 1(b) of the Act, 33 U.S.C. § 701-1(b) (1982), which provides that the use of water for navigation east of the ninety-eighth meridian (*i.e.*, in the Lower Basin States) shall be subordinate to "any beneficial consumptive use, present or future," in the arid States west of that meridian.[12] With that com-

---

[10] S. Doc. No. 191, 78th Cong., 2d Sess. (1944). The Sloan Report was prepared by Bureau of Reclamation Assistant Regional Director Sloan after a five-year study of the physical features and economic development of the Basin.

[11] H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944). The Pick Report was prepared by Colonel Pick of the Corps at the request of Congress after serious floods in the Lower Basin in 1943 and 1944.

[12] *Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources, Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., Part 1, at 55 (1975) ("1975 Hearings").

promise in place, the Upper Basin States were willing to give up land within their borders for the construction of the dams that the Corps believed were necessary to its flood control and navigation purposes. At the same time, the Lower Basin States agreed to the construction of reservoirs with ample storage space for irrigation and other consumptive uses, recognizing that in times of shortage the consumptive uses would have priority. *Ridgeway* at 163-164. This concession by the Lower Basin States ensured that the Secretary, through the Bureau, would play a major role in the Basin's development.

The second critical compromise in the Act was between the competing interests of the Bureau and the Corps. The two agencies realized that the ultimate success of the program would depend upon "coordinat[ing] fully the activities of both agencies." H.R. Doc. No. 475 at 3. Senate Document No. 247 [13] therefore reconciled the differences between the Corps' Pick and Bureau's Sloan Reports. Congress adopted all three documents, now known as the Pick-Sloan Plan, and expressly incorporated them as the "general comprehensive plans" for basin-wide development in Section 9 of the Act.

Three key themes emerge from the Plan documents adopted by Congress in Section 9. First, the Plan was intended to facilitate the full development of the water resources of the Missouri Basin for all uses through close cooperation and coordination between the Bureau and the Corps.[14] Second, both the Bureau and the Corps understood and agreed to the principle of "coordinate jurisdiction," *i.e.*, jurisdiction over Missouri Basin reser-

---

[13] S. Doc. No. 247, 78th Cong., 2d Sess. (1944).

[14] The Pick Report, for example, described the plan as one that would "provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes" and would thereby tend to stabilize "the economic life of the valley and . . . interstate commerce" as well as encourage "industrial and civic developments." H.R. Doc. No. 475 at 28-29.

voirs was not to be allocated according to which agency built a particular reservoir, but rather each agency was assigned responsibility at *each* reservoir according to the functions within that agency's areas of expertise.[15] Finally, the Plan acknowledged that all of the details of the Basin's development had not been—and could not have been—addressed in the Act. Rather, those details were necessarily entrusted to the two agencies, who were made jointly responsible for the most efficient use of the Basin's resources.[16] It is those details which the Secretary and the Corps worked out concerning what has proved to be excess irrigation storage in the main stem reservoirs, including Lake Oahe.

D. Application of the Secretary's Authority to Lake Oahe.

Specifically referencing the Pick-Sloan documents, Section 9(c) of the Act authorizes the Secretary of the In-

---

[15] The Sloan Report described this coordinate jurisdiction in some detail:

> *The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature,* giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers and where the flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. *All irrigation features should be operated by the Bureau of Reclamation or its agents.* All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. *Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.*

S. Doc. No. 191 at 11 (emphasis supplied); *accord* H.R. Doc. No. 475 at 3-4. *See also* S. Doc. No. 247 at 1.

[16] The Sloan Report explained that the Plan "is adapted to development in stages, and to such modifications as changes in physical and economic conditions make necessary." S. Doc. No. 191 at 17.

terior to administer the "reclamation developments" of the Missouri Basin in accordance with general federal reclamation law. Among the Secretary's most basic powers under the reclamation law is the power "to enter into contracts to furnish water for municipal water supply or miscellaneous purposes," provided the contracts "will not impair the efficiency of the project for irrigation purposes." Section 9(c), Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1982). Having found that the ETSI contract would not impair the irrigation function of Lake Oahe and that the irrigation storage in the lake constituted a "reclamation development" within the intent of Section 9, the Secretary approved the ETSI contract.

There is no dispute that the Secretary has the reclamation law authority to market water for industrial purposes at "reclamation developments." *E.g.*, *Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979). The dispute is whether the Secretary's Section 9(c) authority over "reclamation developments" includes Lake Oahe's irrigation storage.[17] The Pick-Sloan Plan demonstrates that Congress did intend the Secretary to have authority over such storage. Moreover, the Secretary has consistently determined that he has such authority, and that determination has been repeatedly confirmed by congressional action.

---

[17] As provided for in the Pick-Sloan Plan, Lake Oahe was built with a capacity of 23,500,000 acre feet to permit, among other things, the irrigation of 750,000 acres of farmland in the adjacent James River Basin of South Dakota. S. Doc. No. 247 at 3. Construction of the lake was completed in 1962, and 18.1 percent of its costs were to be reimbursed through reclamation functions within the jurisdiction of the Bureau. 128 Cong. Rec. S8480 (daily ed. July 16, 1982). Because irrigation demand has not developed as anticipated, however, even the initial stages of the James River irrigation project were never completed. *See* WEB Rural Water Development Project Act of 1982, Pub. L. No. 97-273, §§ 3a and 4,

E. Congress' Confirmation of the Secretary's Construction.

The Secretary has long interpreted his authority under Section 9 of the Act to extend to the disposition of irrigation storage in Corps-operated reservoirs such as Lake Oahe. He has also joined with the Corps in presenting these views to Congress on several occasions. At no time has Congress challenged that interpretation. Indeed, in 1982 Congress acted to preserve the Secretary's interpretation of his authority.

Congress first reviewed the "coordinated agreement" for Missouri Basin development as early as 1955. At that time, a Senate Report noted: "[T]he Secretary of the Interior is responsible for the disposal of water for irrigation or *space reserved for this purpose in any of the dams in the Missouri River Basin* project, while the Secretary of the Army is responsible for flood-control regulation." (Emphasis supplied).[18]

Twenty years later, in an effort to facilitate private development of western energy resources, the Bureau and the Corps entered into a Memorandum of Understanding ("MOU").[19] In that document, the two agencies agreed to engage in a cooperative effort to market water for energy development from the Missouri River's main stem reservoirs. The Secretary of the Interior was to take the lead in contracting for such water uses, while the Secre-

---

96 Stat. 1181, 1182. As a result, none of the water stored in Lake Oahe for irrigation has been used for that purpose.

Virtually the same situation exists at the other main stem reservoirs built to include irrigation storage. Although substantial irrigation occurs at the tributary reservoirs, the irrigation projects envisioned for the main stem reservoirs have not been needed.

[18] S. Rep. No. 1066, 84th Cong., 1st Sess. 3 (1955) (approving construction of two of the tributary dams of the Missouri Basin project, one by the Corps and the other by the Bureau).

[19] The MOU had an initial term of two years, and was later extended through 1978.

tary of the Army was to retain operational control over the reservoirs.[20]

Upon learning of the MOU, Congress convened hearings to review the statutory basis for the water marketing program. In their joint response to Congress, the two agencies explained that their marketing program relied on the authority of the Secretary of the Interior under Section 9 of the Flood Control Act and Section 9(c) of the Reclamation Project Act of 1939.[21] Moreover, they specifically pointed to the ETSI coal slurry pipeline as one of the projects that might benefit from the program. 1975 Hearings at 9. Significantly, Congress took no post-

---

[20] Pursuant to the MOU and after consultation with Basin States, the Secretary of the Interior concluded that two million acre feet of irrigation storage in the main stem reservoirs would not be needed for at least forty or fifty years. The Corps found that one-half that amount could be marketed for energy/industrial uses without affecting the functions within its jurisdiction. 1975 Hearings at 5-6, 23.

[21] Prior to the execution of the MOU, the Acting General Counsel of the Army prepared an opinion which concluded that the Secretary of the Interior has authority to enter into industrial water marketing contracts for irrigation storage at main stem Missouri River reservoirs pursuant to Section 9(c) of the Act. Memorandum for the Chief, Office of Civil Functions, United States Army Corps of Engineers, from Richard V. Kearney, Acting General Counsel (December 16, 1974) (hereinafter "Kearney Opinion"). He further expressed the view, however, that the Secretary of the Interior could not act on such contracts independently. He noted that the Corps should determine whether a proposed industrial use "would interfere with the operation of the reservoirs for flood control." *Id.* at 7.

Following the execution of the MOU, the Corps concluded that at least one million acre feet of irrigation storage could be made available for energy/industrial uses without impairing any other project purpose. 1975 Hearings at 6. Thus, when the Secretary of the Interior signed the ETSI contract, the Corps had already performed its assigned role. No further Corps approval was necessary.

hearing action to amend the law or in any way limit the Secretray's asserted contracting authority.[22]

Even more significantly, in 1982 the Bureau and the Corps again explained to Congress their understanding of the scope of the Secretary of the Interior's industrial water marketing authority under Section 9 of the Act. Congress was at that time considering legislation designed primarily to lift acreage restrictions from certain agricultural lands irrigated from Corps-built reservoirs. *See* Reclamation Reform Act of 1982, § 212(a), 43 U.S.C. § 390*ll*(a) (1982). Congress was concerned, however, that this legislation might undercut the Secretary's ability to recoup the costs of including irrigation storage at Corps-built reservoirs. Commissioner of Reclamation Broadbent assured the Senate that Section 212(b) of the same bill (enacted at 43 U.S.C. § 390*ll*(b) (1982)) would ensure that the *pre-existing* recoupment scheme would be unaffected: as the Commissioner stated, Section 212(b) "assure[s] that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way." 128 Cong. Rec. S8476 (daily ed. July 16, 1982).

General Heiberg of the Corps further explained: "It is general Corps policy to apply Reclamation law to those projects . . . which have irrigation as an authorized purpose." *Id.* at S8478. He added, "the irrigation fea-

---

[22] Only one contract was executed while the MOU was in effect. In December 1978, the Secretary of the Interior signed a water service contract with ANG Coal Gasification Company for 17,000 acre feet of water per year from Lake Sakakawea, another main stem reservoir, for a coal gasification project. He signed a similar contract in November 1979, eleven months after the MOU expired, with Basin Electric Power Cooperative for 19,000 acre feet of water per year, also from Lake Sakakawea, for a steam-generated electric power facility. Both of these contracts were based on the same statutory grants of authority as the ETSI contract, and both projects proceeded without challenge. Nevertheless, these contracts are of doubtful validity following the Eighth Circuit's decision.

ture is normally turned over to [the Bureau of Reclamation] so it can market the water in accordance with its policies and procedures." *Id.* Moreover, he explicitly noted that, under Bureau policies and procedures, some project reimbursement would come from industrial water users like ETSI: "A portion of the mainstem storage space set aside for irrigation *has been contracted for by industrial water users for interim water supplies which will bring a substantial amount of revenue to the United States.*" *Id.* at S8480 (emphasis supplied).

Satisfied with these assurances of the scope of the Secretary's contracting authority and the applicable recoupment provisions of federal reclamation law, Congress passed the described 1982 amendments, leaving Section 9 of the Act—as interpreted by the Corps and the Bureau—unchanged.

F. Rejection of the Secretary's Authority by the Courts Below.

Notwithstanding this long-held and reasonable construction of the Flood Control Act by its executing agencies and Congress' confirmation of that construction, the courts below struck it down. The District Court ruled that the Secretary did not have the authority to execute the ETSI contract because Lake Oahe was not itself a "reclamation development." For this conclusion, the court relied on the undisputed but irrelevant facts that: (1) Lake Oahe was built and is operated by the Corps; (2) its dominant purpose was flood control, and it has never been used for irrigation; and (3) there is no identifiable block of water specifically designated for "irrigation," but rather multiple use storage for navigation, power and irrigation.[23] Pet. App. 54a-55a, 56a-57a, 63a-64a.

---

[23] Although neither the Corps nor the Bureau had encountered any practical difficulties in exercising the requisite coordinate jurisdiction, the District Court could not see "how the Interior Department is to control what cannot be identified." Pet. App. 64a.

The majority decision of the Eighth Circuit likewise rejected the Secretary's interpretation of the Act, on the ground that the Secretary's jurisdiction under Section 9 does not extend to irrigation storage in a Corps-built reservoir unless the water is actually used for irrigation purposes. Pet. App. 27a-28a, 30a. The majority refused to accord any deference to the Secretary of the Interior's contrary interpretation of the Act, reasoning that no deference is required on questions concerning "the limits of [the] agency's statutory authority." *Id.* 33a.

Judge Bright in dissent found that the majority had misconceived the court's role in reviewing an agency's construction of a statute that it administers. Concluding that the Secretary of the Interior's "long-standing and thoroughly reasoned construction" of Section 9 of the Act, *id.* 38a, was a reasonable one, he would have reversed the District Court's ruling and upheld the Secretary's authority. *Id.* 43a-44a.

An evenly-divided (5-5) *en banc* Court of Appeals denied ETSI's petition for rehearing. Under the Eighth Circuit's local rule, Senior Judge Bright did not participate in the vote on the rehearing petition. Significantly, with but one exception, every judge from a Lower Basin State voted to deny the petition while every judge from an Upper Basin State voted to rehear the panel's 2-1 decision.[24]

---

[24] In a separate proceeding below, respondents sought dismissal of the appeal on the ground of mootness. The Eighth Circuit therefore remanded the case for factual findings on that issue. Following discovery and a hearing, the District Court found as a matter of fact that the ETSI contract was still valid, had not been terminated or abandoned, and was assignable under some conditions. He therefore rejected respondents' claims of mootness. Based on the District Court's findings, the Eighth Circuit affirmed. These factual determinations conclusively demonstrate that a live controversy is presented by ETSI's petition and there is therefore no need for this Court to consider that issue further. *See Washington Metropolitan Transit Authority* v. *Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 622-23 (1982).

REASONS FOR GRANTING THE WRIT

For three reasons, the described controversy over the Secretary's authority is of such significance that it merits review by this Court. First, the invalidation of the Secretary's authority by the court below effectively renders unavailable for consumptive use an important water resource in the western part of the country. The invalidation also jeopardizes a federal program designed to facilitate the maximum beneficial use of that resource and to pay the costs of maintaining that resource through private contracts. Second, the invalidation of the Secretary's authority rests on a construction of federal law that totally negates any prerogative of the affected States to control water use within their own borders. Finally, by rejecting the Secretary's interpretation of the statute, the court below has not only ignored Congress' approval of that interpretation, but it has also undermined clear principles established by this Court requiring deference to such agency interpretations.

1. *The Decision Below Threatens the Strong Federal Interest in Efficient, Beneficial Use of the Nation's Water Resources.*

By adopting and incorporating the Pick-Sloan Plan in Section 9 of the 1944 Flood Control Act, Congress intended that the Plan would take into account "[e]very water resource and all feasible beneficial uses of water" in order to arrive at a "basin-wide plan most likely to yield the greatest good to the greatest number of people." S. Doc. No. 191 at 17. The hallmark of the Plan was flexibility, allowing the two agencies responsible for its implementation to adopt "such modifications as changes in physical and economic conditions make necessary." *Id.* A key feature built into the Plan to preserve this flexibility was the concept of shared jurisdiction. The Plan "[did] not vest primary rights in anybody." [26] Rather, it

---

[26] *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. 669 (1944)

"rest[ed] upon the basic concept that water is to be used by the people who can use it." [25]

By undercutting this concept of shared jurisdiction, the Eighth Circuit's ruling subverts two important federal interests underlying the Flood Control Act: (1) it deprives the administering agencies of their Section 9 flexibility to adapt to changing conditions in the Basin, effectively rendering irrigation storage in the main stem reservoirs unavailable for any new consumptive use; and (2) it cripples Congress' repayment scheme for irrigation storage in Corps-built reservoirs, a scheme Congress reaffirmed only four years ago.

(a) *The decision below leaves water stored for irrigation in main stem reservoirs unavailable for any new consumptive use.*

The courts below treated this case as nothing more than a debate over which of two federal agencies is the appropriate marketing authority for irrigation water stored in Corps-operated reservoirs; they assumed that the Corps has this authority pursuant to Section 6 of the Act. This assumption is erroneous.

In fact, virtually no water stored in the main stem reservoirs can be made available under Section 6. That section permits the Corps to contract only "for domestic and industrial uses for *surplus* water that may be available at any reservoir under the control of the [Corps]: *Provided*, That no contracts for such water shall ad-

---

(remarks of Colonel Reber) ("1944 Senate Hearings"). As Colonel Reber (a principal proponent of the Plan from the Corps) acknowledged to Congress at the time of the Act's passage, "all of the details of this great Missouri program will not be worked out for 10 years or 20 years or even more." *Id.* at 668-69.

[25] *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works*, 85th Cong., 1st Sess., Part 2, at 320 (1957) (remarks of Senator O'Mahoney).

versely affect then existing lawful uses . . . ." 33 U.S.C. § 708 (1982) (emphasis supplied). The described "surplus water" is either water never earmarked for a particular purpose [27] or water not currently being used for any authorized project purpose.[28] The water ETSI contracted for is not "surplus" under either definition. That water was originally earmarked for irrigation and, in the interim, runs through the turbines at the Oahe dam to generate hydroelectric power; both irrigation and power generation are authorized project purposes. For this reason, the Acting General Counsel of the Army has expressly determined that the Corps is *not* free to market such water under Section 6 of the Act. Kearney Opinion at 7. The Eighth Circuit has therefore contradicted the construction of the Act of both agencies charged with its administration.

More significantly, as Judge Bright recognized in his dissent, the result of the Eighth Circuit's decision is that *no* federal agency has the power to authorize beneficial consumptive uses of irrigation water such as that stored in vast Lake Oahe. Pet. App. 38a n.4. Congress clearly did not intend such an absurd result.

Instead, in approving the Pick-Sloan Plan, Congress anticipated that Lake Oahe, like other multiple-purpose

---

[27] 90 Cong. Rec. 4133 (1944) (remarks of Rep. Curtis); *see also* 1975 Hearings at 31.

[28] Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, section 7-3(c) (January 29, 1982). Pursuant to the Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 319 (codified as amended at 43 U.S.C. § 390b (1982)), the Corps has adopted a regulation authorizing contracts for the lesser of 15 percent or 50,000 acre feet of water from any reservoir for municipal or industrial users. *Id.*, section 7-3(b). This is an insignificant amount of water—less than .2 percent of the volume of Lake Oahe—and thus this authority is not a meaningful alternative to the authority of the Secretary of the Interior under Section 9(c).

reservoirs in the Basin,[29] would face changing conditions that would require flexible responses by the agencies in order to achieve the Act's overarching objective: "the most efficient utilization of the waters of the Missouri River Basin for all purposes." H.R. Doc. No. 475 at 29. The ETSI contract and others like it reflect the Secretary's considered judgment concerning how best to meet this objective in light of the unforeseen circumstance of substantial excess irrigation storage. This is precisely the kind of adaptation to changing conditions that was written into the Pick-Sloan Plan and Section 9 of the Act. *See* S. Doc. No. 191 at 17. The Eighth Circuit's decision has written such flexibility out of the Act and has thereby decreed that valuable water will be unavailable for any consumptive use.[30]

(b) *The decision below deprives the federal government of the ability to obtain repayment for the irrigation storage included in Corps-built reservoirs.*

Recoupment of costs from project beneficiaries is a fundamental principle underlying reclamation law. 1944 Senate Hearings at 201.[31] In planning projects with irrigation storage, the Bureau assumes that irrigation users

---

[29] Although the Pick-Sloan Plan called for the construction of a system of approximately ninety reservoirs, S. Doc. No. 247 at 1-5, Lake Oahe is the second largest, accounting for more than twenty percent of the total storage capacity of the Basin reservoirs, *id.*; 1975 Hearings at 30.

[30] Under the Eighth Circuit's construction of Section 9, the only conceivable circumstance in which the irrigation storage could become available for consumptive use would be if the Secretary of the Interior first constructed unnecessary irrigation works for the water. Congress clearly did not intend that such needless construction occur and the possibility that it would be authorized is remote.

[31] By contrast, flood control and navigation, functions that fall within the Corps' jurisdiction, are not reimbursable. *E.g.*, *Ridgeway* at 144.

will repay a major portion of the construction costs. And when irrigation storage is included in a Corps project, a portion of the project costs is specifically allocated to the reimbursable features. 128 Cong. Rec. S8480 (daily ed. July 16, 1982). As previously stated, such an allocation occurred in the case of Lake Oahe. *See supra* n.17. Moreover, Congress has recently acknowledged that the reclamation program "has evolved through the decades and is now a major water resource program involving major river basin development projects providing hydroelectric power, municipal and *industrial water supply*, fish and wildlife conservation, flood control, and public recreation in addition to the original irrigation purpose." [32] Thus, Congress and the Bureau look to non-irrigation users to contribute to the repayment of project costs such as the irrigation storage in Lake Oahe. *Id.* at 2573.

Yet, under the Eighth Circuit's decision, such repayments will not be available to the federal government, notwithstanding Congress' 1982 action expressely endorsing repayment to the Secretary through contracts like ETSI's.[33] Such a blow to the Secretary's ability to implement and fund a program crucial for delivery of the nation's water resources merits this Court's review.

2. *The Decision Below Jeopardizes the Rights of the States to Control Water Uses Within Their Borders.*

The Flood Control Act declares that it is "the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . . ." 33 U.S.C. § 701-1. The decision below flies in the face of this clear

---

[32] S. Rep. No. 373, 97th Cong., 2d Sess. 8 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2570, 2572 (emphasis supplied).

[33] *See* discussion *supra* pp. 15-16.

policy. It does so, first and most obviously, by effectively overturning the permit South Dakota issued to ETSI. More importantly, it does so by putting all irrigation water stored in Corps reservoirs in the Missouri Basin beyond the jurisdiction of any federal agency and, therefore, beyond any State control over that water—in direct contradiction of Congress' policy to accommodate state water interests whenever possible. Furthermore, the decision below strips the federal agency that has a long history of cooperation with States and respect for state water law of any voice in the distribution of water stored in Corps reservoirs. This grave, unwarranted encroachment on state interests merits this Court's review.

As previously discussed, the state interests here at stake are fundamental ones. Sections 9 and 1(b)[34] both reflect a balancing of the interests of the Lower Basin States in flood control and navigation and the interests of the Upper Basin States in irrigation against other consumptive uses of water. *See* discussion *supra* pp. 8-10.

The Lower Basin States realized the benefits of the Act as soon as the main stem dams and reservoirs were built, thereby permitting the regulation of stream flows. By contrast, the Upper Basin States, who gave up thousands of acres of their land to permit the creation of the reservoirs, have gained very little because the large-scale irrigation projects they were intended to enjoy have proved infeasible. Industrial water marketing, which was to be carried out by the Secretary of the Interior in conjunction with the States, offered the Upper Basin States the promise of some tangible benefit from these reservoirs. *See* 1975 Hearings at 7; 128 Cong. Rec. S11305, S11308 (daily ed. Sept. 10, 1982). The Eighth Circuit ruling removes the possibility of that benefit as well. The effect of this ruling is to eviscerate the two compromises that were instrumental to the passage of the Act.

---

[34] 33 U.S.C. § 701-1(b).

Moreover, until the Eighth Circuit's ruling, the Upper Basin States looked to the Bureau's unique expertise in meeting their needs for consumptive uses of water. In developing that expertise, the Bureau has also established a tradition of deference to state water laws. Since its inception, federal reclamation law has been based on a "purposeful and continued deference to state water law," *California* v. *United States*, 438 U.S. 645, 653 (1978), and it is now settled that, in the absence of a *specific* contrary directive from Congress, the Bureau must adhere to state law, *id.* at 678. The Corps has no such tradition or expertise. Thus, by divesting the Secretary of the Interior of his role in administering the irrigation storage of the main stem reservoirs, the Eighth Circuit has left the Upper Basin States without the safeguard of an agency that has the clear, established obligation to protect their rights.

This Court has long recognized the great importance of state water rights issues such as those presented in this case. *E.g.*, *California* v. *United States*, *supra*; *Arizona* v. *California*, 373 U.S. 546 (1963); *see also Sporhase* v. *Nebraska*, 458 U.S. 941 (1982). It has also recognized the importance of reviewing collisions between States over such water rights,[35] as well as collisions between the federal government and the States over those rights.[36] This case presents both kinds of collisions, and it therefore merits this Court's review.

3. *The Decision Below Directly Conflicts with Decisions of this Court Requiring Judicial Deference to Reasonable Agency Constructions of Their Enabling Statutes.*

Finally, this case merits review because the Eighth Circuit's decision violates an important principle of def-

---

[35] *E.g.*, *Colorado* v. *New Mexico*, 467 U.S. 310 (1984); *Sporhase* v. *Nebraska*, *supra*; *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945).

[36] *E.g.*, *California* v. *United States*, *supra*; *Arizona* v. *California*, *supra*; *United States.* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

erence to agency expertise established by this Court. Three Terms ago this Court declared that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of [an] agency" charged with enforcement of the statute. *Chevron U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In the three succeeding years, the Court has *unqualifiedly* applied this standard of deference to agency interpretations.[37] Nevertheless, the Eighth Circuit in the present case has refused to follow *Chevron*, distinguishing it in a way that jeopardizes the continuing vitality of that decision.

As discussed, the question in this case is whether, within the meaning of Section 9 of the Flood Control Act, the term "reclamation . . . developments to be undertaken by the Secretary of the Interior" covers disposition of the irrigation water stored in the Oahe Reservoir. The Secretary has construed the term to include the Oahe irrigation water. The Eighth Circuit, based on its

---

[37] *See, e.g., Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245 (1986) (deferring to Commissioner's interpretation of CFTC's adjudicatory power to include compulsory counterclaims); *Young* v. *Community Nutrition Inst.*, 106 S. Ct. 2360 (1986) (deferring to Food & Drug Administration's interpretation of mandate to promulgate regulations for toxic substances to allow discretion); *Federal Deposit Ins. Corp.* v. *Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986) (deferring to FDIC's interpretation of "deposit" to exclude standby letters of credit backed by contingent promissory notes); *United States* v. *City of Fulton*, 106 S. Ct. 1422 (1986) (deferring to Energy Secretary's interpretation of 1944 Flood Control Act to permit interim increases in power rates); *United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985) (deferring to Corps' interpretation of "navigable waters" to include adjacent wetlands); *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985) (deferring to HHS Secretary's interpretation of "institution for mental diseases" to include some "intermediate care facilities"); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985) (deferring to EPA Secretary's interpretation of "modify" to allow variances for "fundamentally different factors").

own "review of the Act and its legislative history," was "convince[d]" that the term did not include such water. Pet. App. 33a. It therefore rejected the Secretary's construction.

Contrary to the command of *Chevron*, however, the Eighth Circuit never even considered whether the Secretary's construction of his Section 9(c) authority was *a reasonable* interpretation of the statute and therefore binding on the courts. Instead, the Court of Appeals first construed the statute on its own and then held that the Secretary's construction was entitled to no deference because his interpretation of his "statutory mandate" was *incorrect*.

The court's sole justification for this inversion of *Chevron* was its contention that "[t]he *Chevron* rule requires deference only where an agency reasonably construes the applicable statute *on a matter which is within its jurisdiction to decide*." Pet. App. 33a (emphasis supplied). Having already determined on its own construction of Section 9, the court reasoned that the Secretary's "assertion of . . . authority" over Oahe water was "beyond his statutory mandate *and therefore not entitled to judicial deference*." *Id.* at 33a-34a (emphasis supplied). Under that analysis, a court would be free to substitute its judgment for the agency's in *every* case where the agency's "jurisdiction" or the scope of its "statutory mandate" could be said to be at issue. There are very few agency decisions which could not be so characterized, as this Court's decisions in *Chevron* and its progeny clearly demonstrate.

For example, *Chevron* itself presented the question whether a permit system established under the Clean Air Act was applicable to certain state industrial plants. That applicability turned on the EPA's construction of the statutory term "stationary sources," an agency construction which this Court said was owed deference. 467 U.S. at 844-45, 864-66. Yet under the Eighth Cir-

cuit's analysis, the EPA's construction could presumably have been ignored by the courts because it was determinative of the *jurisdictional* reach of the agency's authority.

Similarly, in *United States* v. *Riverside Bayview Homes, Inc.*,[38] a post-*Chevron* case much like the present one, the question was whether the Army Corps of Engineers' jurisdiction over "navigable waters" under the Clean Air Act encompassed certain wetlands adjacent to bodies of water. Citing *Chevron*, this Court held that, where the Corps had determined that it had authority over such wetlands, the judiciary's role was "limited to the question whether it is reasonable . . . for the Corps *to exercise jurisdiction over* [*the*] *wetlands* . . . ." 106 S. Ct. at 461 (emphasis supplied). This was so even though the Court defined the issue as "a problem of *defining the bounds of* [*the agency's*] *regulatory authority*." *Id.* at 462 (emphasis supplied). The Eighth Circuit's interpretation of *Chevron* simply cannot be squared with *Riverside Bayview Homes*.[39]

Furthermore, if there be any doubt that the Eighth Circuit has misconstrued its role under *Chevron*, this

---

[38] 106 S. Ct. 455 (1985).

[39] The Eighth Circuit's analysis is also at odds with *United States* v. *City of Fulton*, 106 S. Ct. 1422 (1986). That case concerned the authority of the Secretary of Energy to implement certain interim rate increases under section 5 of the 1944 Flood Control Act. The Secretary had concluded that he had such authority. As in this case, the lower court held that "the Secretary's actions exceeded his contractual and statutory authority. . . ." *Id.* at 1424. Citing *Chevron*, this Court reversed, stating that even though Congress had not expressly authorized the increases, the Secretary's interpretation represented "a reasonable accommodation of the policies underlying [the] Act." *Id.* at 1430. Accordingly, it deferred to that interpretation. *See also Federal Deposit Ins. Corp.*, 106 S. Ct. at 1938-39 (relying on *Chevron* to uphold FDIC's determination that certain standby letters of credit fell outside its jurisdiction over "deposits"); *Chemical Manufacturers Ass'n*, 470 U.S. at 134 (*Chevron* precludes court from rejecting EPA's reasonable construction of its statutory authority).

Court's most recent explanation of the *Chevron* principle surely removes that doubt. In *Commodity Futures Trading Commission* v. *Schor*,[40] the CFTC had determined that its jurisdiction under the Commodity Exchange Act allowed it to entertain state law counterclaims in reparation proceedings. The Court of Appeals refused to defer to this CFTC determination, in part because that court believed it possessed "superior expertise" on questions of agency "jurisdiction;" the court's rationale was that a "statutory interpretation-jurisdictional question . . . is precisely the kind with which courts customarily deal." *Schor* v. *Commodity Futures Trading Commission*, 740 F.2d 1262, 1279 (D.C. Cir. 1984).

This Court reversed, and in so doing expressly rejected the claim that "jurisdictional" issues are exempt from the deference requirement:

> [T]he Court of Appeals was incorrect to state on the facts of this case that the CFTC's expertise was not deserving of deference because of the "statutory interpretation-jurisdictional" nature of the question at issue. An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is "reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes" of the Act of the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.

106 S. Ct. at 3254-55 (citation omitted). The decision below is plainly at odds with this reasoning.[41]

---

[40] 106 S. Ct. 3245 (1986).

[41] The Eighth Circuit majority proposed to justify its departure from cases such as *Riverside Bayview Homes* on two grounds. First, the court contended that "jurisdictional" questions are ordinarily matters of "a legal conclusion based solely on [a] reading of the statutory language—a function courts are capable of performing." Pet. App. 34a n.25. This was precisely the same reasoning used by the D.C. Circuit in *Schor*, which this Court decisively

If the Eighth Circuit's broad exception to *Chevron* is allowed to stand—if the lower courts are free to substitute their judgments for the agencies' in all cases where the scope of the agencies' jurisdictional authority can be said to be at issue—little will be left of the *Chevron* decision. The Court should therefore grant review in this case to make clear that *Chevron*, *Bayview Homes*, and *Schor*[42] cannot be circumvented by labeling an agency determination "jurisdictional" and to reconfirm that agencies which make reasonable judgments construing

---

rejected. Moreover, as previously explained, interpretation of Section 9 of the Act involves a great deal more than a simple "reading of the statutory language." Instead, it involves the construction of an ambiguous, undefined term—"reclamation development"—in light of the three important purposes underlying Congress' adoption of Section 9: (a) beneficial use of the Basin's available water; (b) shared jurisdiction between the Bureau and the Corps based on their respective areas of interest and expertise; and (c) efficient management of the Basin by the two agencies based on changing circumstances.

The Eighth Circuit also purported to distinguish *Bayview* on the ground that in that case the agency's interpretation was "*specifically brought* to Congress' attention . . . ." *Id.* (emphasis in original). But the same is true here; the Secretary's interpretation of Section 9 was in fact brought specifically to Congress' attention. Moreover, this Court has *never* indicated that deference to agency interpretation is due only where that interpretation has been presented to Congress; rather, presentation to Congress is used by this Court to confirm the reasonableness of the agency's interpretation. *See Schor*, 106 S. Ct. at 3255; *Bayview*, 106 S. Ct. at 464-65; *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599-602 (1983).

[42] While we believe this Court had made clear long before *Schor* that deference is owed to agency constructions even in "jurisdictional" matters, *Schor* was the first case to squarely address that issue. Inasmuch as *Schor* was decided after the Eighth Circuit's decision in this case, the Court could choose to vacate and remand the case for reconsideration in light of *Schor*. Because of the importance of the issues presented, however—both as to *Chevron* as well as to the substantive federal and state water rights at stake—we submit that a summary remand is inappropriate.

their statutory mandates—including the boundaries of those mandates—are entitled to deference from the courts.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4544
Counsel for Petitioner

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1674

THE STATE OF MISSOURI, THE STATE OF IOWA and THE STATE OF NEBRASKA,

Appellees,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Enginers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARREY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the Interior, The Department of the Interior,

Appellants.

KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB, THE NEBRASKA CHAPTER OF THE FARMERS EDUCATION AND COOPERATIVE UNION OF AMERICA; THE ROCKY MOUNTAIN CHAPTER OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA; and THE IOWA CHAPTER OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA,

Appellees,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers, Omaha, Nebraska; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; MAXWELL T. L. LIFURANCE, Wyoming State Director, Bureau of Land Management; ROBERT F. BUFORD, Director Bureau of Land Management; GARREY E. CARUTHERS, Assistant Secretary of the Department of the Interior for Land and Water Resources; JAMES G. WATT, Secretary of the United States Department of the Interior; CRAIG W. RUPP, Regional Forester, Region II, (Rocky Mountain Region), United States Forest Service; R. MAX PETERSON, Chief United States Forest Service; JOHN R. BLOCK, Secretary of the United States Department of Agriculture; ANNE M. GORSUCH, Administrator, Environmental Protection Agency,

Appellants.

No. 84-1675

THE STATE OF MISSOURI, THE STATE OF IOWA and THE STATE OF NEBRASKA,

Appellees,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Divi-

sion Engineer, Missouri River Division, United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARREY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the United States Department of the Interior; Energy Transportation Systems, Inc.,

Appellants.

KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB, the NEBRASKA CHAPTER OF THE EDUCATION AND COOPERATIVE UNION OF AMERICA, THE ROCKY MOUNTAIN CHAPTER OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, and THE IOWA CHAPTER OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA,

Appellees.

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District; United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers, Omaha, Nebraska; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclaamtion; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; MAXWELL T. L. LIFURANCE, Wyoming State Director, Bureau of Land Management; ROBERT F. BUFORD, Director, Bureau of Land Management; GARREY E. CARUTHERS, Assist-

ant Secretary of the Department of the Interior for Land and Water Resources; JAMES [G.] WATT, Secretary of the United States Department of the Interior; CRAIG W. RUPP, Regional Forester, Region II, (Rocky Mountain Region), United States Forest Service, R. MAX PETERSON, Chief, United States Forest Service; JOHN R. BLOCK, Secretary of the United States Department of Agriculture; ANNE M. GORSUCH, Administrator, Environmental Protection Agency; Energy Transportation Systems, Inc.,

Appellants.

No. 84-1719

THE STATE OF MISSOURI and THE STATE OF IOWA,
THE STATE OF NEBRASKA,

Appellant,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARREY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the United States Department of the Interior,

Appellees,
ENERGY TRANSPORTATION SYSTEMS, INC.,

Appellee.

No. 84-1720

THE STATE OF MISSOURI and THE STATE OF NEBRASKA,
THE STATE OF IOWA,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer; Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division; United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region[], Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARRY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the United States Department of the Interior,

Appellees,

ENERGY TRANSPORTATION SYSTEMS, INC.,
Appellee.

No. 84-1721

THE STATE OF MISSOURI,
Appellant,

THE STATE OF NEBRASKA and
THE STATE OF IOWA

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division; United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region[], Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARREY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the United States Department of the Interior,

Appellees,

ENERGY TRANSPORTATION SYSTEMS, INC.,
Appellee.

Appeals from the United States District Court
for the District of Nebraska

Submitted: August 20, 1985

Filed: March 13, 1986

Before JOHN R. GIBSON and FAGG, Circuit Judges, and BRIGHT, Senior Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

On July 2, 1982 the Department of the Interior and Energy Transportation Systems, Incorporated, (ETSI)

executed an Industrial Water Service Contract authorizing ETSI to withdraw 20,000 acre-feet of water per year, for forty years, from the Oahe reservoir in South Dakota. The States of Missouri, Iowa, and Nebraska filed an action in federal district court to enjoin performance of the contract. They also sought a declaration that officers in the Department of the Interior, the Bureau of Reclamation, and the Department of the Army, had violated various federal statutes by their approval and execution of the ETSI contract. The district court [1] held that the Oahe dam and reservoir were not reclamation projects under the Flood Control Act of 1944 and, therefore, the Secretary of the Interior lacks the statutory authority to execute unilaterally a water service contract to provide water from the Oahe reservoir for industrial use. We affirm the court's judgment that the Secretary of the Interior lacked the authority to execute the ETSI contract.

Our decision makes it unnecessary that we decide many of the other issues presented by these appeals. Serious objections are raised with respect to the standing of Kansas City Southern Railway Co., the Sierra Club, and the Nebraska and Iowa Chapters of the National Farmers Union. All of these parties challenge primarily the authority of the Secretary of the Interior to unilaterally enter the ETSI contract. Since we decide this issue in the States' appeal, any further discussion would be superfluous and detailed consideration of the difficult standing issues is therefore unnecessary.

ETSI planned to transport water by pipeline from the Oahe reservoir in South Dakota to Wyoming where it would be mixed with locally-mined coal to form a coal slurry; the slurry would be transported, again by pipeline, for use in coal-fired steam-generating power plants.

---

[1] The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

The water service contract recites that it was executed pursuant to section 9(c) of the Flood Control Act of 1944 (the Act), Pub. L. No. 78-534, 58 Stat. 887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891. Joint Appendix (J.A.) at 412; and section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1982). The contract states that it had been reached "after consultation with the Secretary of the Army", but does not state whether the Army approved the contract. *State of Missouri v. Colonel William Andrews*, 586 F. Supp. 1268, 1272 (D. Neb. 1984).

To appreciate the substantive issues involved in this case, a discussion of the history of the Missouri River Basin development plans is required. Missouri River Basin development necessarily implicated the interests of two federal agencies: the War Department[2] which, through its subdivision, the Army Corps of Engineers, was primarily responsible for flood control and navigation throughout the country; and the Department of the Interior which, through the Bureau of Reclamation, supervised the reclamation of arid lands throughout the seventeen western states.

Prompted by flood damage and a need for a controlled water supply on the Missouri River and its tributaries, both agencies undertook studies to develop the Basin. The Corps' plan, named for Colonel Pick who prepared the report, was formalized in Congress as House of Representatives Document No. 475, 78th Cong. 2d Sess. (1944). The Bureau's report, named the Sloan plan after its author, was formalized in Congress as Senate Document No. 191, 78th Cong. 2d Sess. (1944). The district court summarized the relevant contents of both plans:

> The Corps' plan for the basin, H.R. Doc. No. 475 (the Pick Plan) proposed building five dams on the

---

[2] Renamed the Department of the Army by section 205(a) of the Act, 61 Stat. 501 (1947). Referred to in this opinion as "the Army", or "Army".

> main stem of the Missouri River below Fort Peck Reservoir in Montana, including six million acre-feet reservoirs at Oahe and Oak Creek in South Dakota. The dams were to be used for flood control, navigation, irrigation, and power production, while a number of very small flood control dams were to be built on the Missouri's tributaries.
>
> The Bureau's report (the Sloan Plan) disagreed with the Pick Plan as to where the dams should be built, * * * and as to the size of Oahe Dam. The Sloan Plan proposed a 19.6 million acre-feet Oahe Reservoir which would have flooded out the Oak Creek Dam and furnished water for irrigation of 750,000 acres in South Dakota's James River Basin, navigation, and power production, as well as flood control.

State of Missouri, 586 F. Supp. at 1269 (citations omitted).

A senate committee harmonized the Pick and Sloan plans, producing the joint Pick-Sloan plan which Congress adopted in section 9(a) of the 1944 Flood Control Act. Multiple use reservoirs were an integral part of the development plan. The introduction to the Pick-Sloan plan proposed the following allocation of functions in multiple use projects:

> 3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:
>
> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capaci-

> ties on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.
>
> (c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

S. Rep. No. 2471, 78th Cong. 2d Sess. (1944). This is the only place in the Pick-Sloan plan where control is discussed.

The Oahe reservoir in South Dakota was one of the main-stem reservoirs constructed pursuant to the Pick-Sloan plan. The Sloan plan's specifications for Oahe were adopted in the Pick-Sloan plan and the dam was built and operated by the Corps of Engineers.

During 1973 and 1974, the federal government began plans to develop coal and mineral deposits located in Eastern Montana and Wyoming. To expedite the use of water from the main-stem reservoirs in this process, the Army and the Department of the Interior entered a Memorandum of Understanding (MOU). Under the MOU, the Department of the Interior would determine the volume of water stored in the main-stem reservoirs which was not currently needed for irrigation. The Army would then determine the volume of that excess water available for industrial purposes. The Department of the Interior then could contract, on terms agreeable to the Army, for industrial uses of the available water. The MOU stressed cooperative action. Then Acting General Counsel to the Army, Richard Kearney, endorsed the MOU as an interim measure pending final resolution of the agencies' authority to contract for the sale of main-stem reservoir water for industrial purposes. He con-

cluded, however, that the Secretary of the Interior [3] did not have the authority to unilaterally market the water from these reservoirs for industrial purposes. *Memoranda For The Chief, Office of Civil Functions*, Dec. 16, 1974. J.A. at 170. The MOU expired December 31, 1978 and was not renewed. The ETSI contract was executed in 1982, after the MOU expired. The ETSI contract represents the first time that the Secretary of the Interior has attempted to unilaterally market water from a mainstem reservoir for industrial purposes.

To decide whether the Secretary of the Interior had authority to unilaterally execute the ETSI contract, the district court scrutinized the language and legislative history of the Act to determine how it delegated authority to the two federal agencies. The court concluded that the Secretary of the Interior lacked the authority to enter the contract and enjoined its performance.

The federal defendants and ETSI separately appeal this judgment. They argue, first, that the district court erroneously interpreted the authority delegated under the Act to the Secretary of the Interior and, second, that Congress has accepted the Secretary's interpretation of his powers under the Act. They also argue that the states do not have standing to assert these claims or, alternatively, that if the states do have standing then the matter becomes one within the exclusive jurisdiction of the United States Supreme Court.

I.

Before discussing the substantive merits of this case, we address two threshold questions. The first is whether the states of Iowa, Nebraska, and Missouri have standing to assert the claims raised in the district court. The states' complaint alleged that the planned depletion of Missouri River Basin water threatens their right to ob-

[3] Throughout this opinion we will refer to the Secretary of the Interior as such or as "the Secretary".

tain sufficient quantities of Missouri River water for such beneficial uses as production of hydro-electric power, transportation, and waste disposal. They also claimed that the planned depletion would injure fish and wildlife habitats. J.A. at 51. They further alleged that the federal appellants' conduct was the source of these threatened injuries and gave rise to causes of action under the following federal statutes: The Flood Control Act of 1944, 33 U.S.C. §§ 701-709 (1982); The National Environmental Policy Act of 1961, 42 U.S.C. §§ 4321-4395 (1982); The Fish and Wildlife Coordination Act, 16 U.S.C. § 1531 (1982); The Reclamation Project Act of 1939, 43 U.S.C. § 485(h) (1982); The Water Supply Act of 1958, 43 U.S.C. § 390b (1982); The Administrative Procedure Act, 5 U.S.C. § 706 (1982). The appellants argued that the reduction in Missouri River Basin water which the ETSI contract will cause is insignificant and will not work the injuries which the appellees allege.

The district court carefully analyzed each of the six counts in the states' complaint. It determined that, at least with respect to five of the six counts, the states had standing to assert the injuries alleged.[4] The court held that the states were members of the class of users of

---

[4] Count III of the states' complaint stated that "[t]he ETSI water service contract is void because it purports to provide water for a purpose that Congress did not authorize." J.A. at 83. The district court declined to rule on standing with respect to this count because the plaintiffs had failed to specify the source of this cause of action. *State of Missouri*, Slip op. at 4. Count V of the State's complaint was based in part on the Water Supply Act, 43 U.S.C. § 390b(d). The court found that this section does not confer any rights on a specific group and therefore does not provide a private cause of action. *Slip op.* at 5. The court found, however, that review was available under the Administrative Procedure Act. *Id.*

The district court denied the states' standing to sue as parens patriae. Because we affirm the court's judgment that the states have standing to sue on their own behalf, we need not address their standing to sue as parens patriae.

Missouri River Basin water whose interests are protected by section 708 of the Flood Control Act, 33 U.S.C. § 708 (1982). *State of Missouri v. Colonel William Andrews*, No. CV 82-L-442, slip op. at 4 (D. Neb. Mar. 6, 1984). The court also found that the allegations of injury to fish, wildlife habitats, and sewage disposal stated a cause of action under the National Environmental Policy Act, 16 U.S.C. §§ 661, 1531. *State of Missouri*, slip op. at 4. Finally, the court held that the states had standing to invoke judicial review of the agencies' allegedly improper conduct under the Administrative Procedure Act, 5 U.S.C. § 701 (1982).

To establish standing to assert their claims, the states must allege that the challenged administrative conduct has, or will cause them injury in fact, economic or otherwise, and that the injured interests arguably are within the zone of interest protected by the statutes invoked. *See Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150, 152 (1970); *see also Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976). We conclude that the states' allegations of injury to the beneficial uses of Missouri River Basin water, and to the fish and wildlife habitats which this water supports, meet the injury-in-fact requirement. The appellants' argument that this injury is not fairly traceable to their actions, nor likely to be redressed by our decision today, is unpersuasive.[5]

---

[5] The appellants also argue that the states have no standing because the alleged injuries cannot be redressed by a decision of this court. They point out that ETSI obtained its water rights from the State of South Dakota which is not a party to this action. The fact that South Dakota granted ETSI the natural flow rights does not deny the states standing to challenge the contract allowing ETSI to withdraw water from the federal reservoir. We point out that the relevant inquiry is whether a claim is *likely* to be redressed by a favorable decision. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (*citing Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 98 (1976)). The district court found

The appellants specifically challenge the district court's holding that the states are within the class of users whose interests are protected under section 6 of the Act, 43 U.S.C. § 708 (1982). They argue that section 6 is intended only to protect prior holders of water rights, granted under state law, from appropriation by the federal government.[6] We do not think that this language must be read so narrowly. Section 6 of the Act evinces an intent to protect the interests of established users of Missouri River Basin water by ensuring that the Army considers their needs when determining whether there is surplus water available for industrial use. The states are current lawful users of Missouri River Basin water. The ETSI contract threatens their established interests. As such, we hold that the injuries alleged are within the zone

---

that the water service contract at issue provides that it will become void if the federal permits and approval are overturned. *Slip op.* at 3. The parties also agree that loss of the federal water service contract would effectively undermine ETSI's ability to undertake the planned coal slurry project. Brief for Federal Appellants at 20-21. The water service contract is a primary feature of the ETSI plan to use Missouri River Basin water stored in a federal reservoir as a transportation medium, and a sufficient causal connection exists between the contract and the threatened injury to the states.

Our decision in this case does not address the issue of South Dakota's right, as against other states and the federal government, to allocate waters within its borders. This issue was not presented to us and South Dakota is not a party to this case.

We are aware that the State of South Dakota has filed an original action with the United States Supreme Court which raises these issues.

[6] Section 6 provides:

> That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water * * * *

of interests protected under the Act.[7] *See, e.g., Granville House, Inc. v. Department of Health and Human Services*, 715 F.2d 1292, 1299 (8th Cir. 1983) (the prudential zone of interest test is satisfied if there is a sufficient nexus between the statutory purpose and the alleged injury.)

The second threshold question which we must decide is whether the Secretary of the Army joined in the execution of the ETSI contract. Only the Regional Director of the Bureau of Reclamation signed the contract for the government. However, it does recite that it was executed "after consultation with the Secretary of the Army." J. A. at 388. This court requested that the parties submit further information indicating whether the contract was jointly executed. In response, the federal appellants stated that "no action was taken by the Secretary of the Army under [the authority of section 6 of the Act]." *Response of Federal Appellants to Courts Sept. 24, 1985 Order* at 2.[8] The federal appellants went on to state, however,

---

Pub. L. No. 78-534, 58 Stat. 887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891 (emphasis added) *as codified at* 33 U.S.C. § 708 (1982).

[7] The appellants argue, alternatively, that if we grant the states standing to sue in this action, we must find that the suit is one between two or more states and dismiss the cause under the Eleventh amendment, for lack of jurisdiction. They contend that since South Dakota granted ETSI a water right, South Dakota's right to allocate water within its boundaries is in question. We reject this characterization of the issue before the court. The states' complaint alleges violations of federal statutes and challenges the conduct of federal agencies. As such our decision deals solely with the validity of the federal appellants' conduct.

[8] The states had maintained throughout this case that the Secretary of the Interior had acted unilaterally. In their response to the court's request, they refer to their Statement of Material Facts As To Which There Is No Dispute, and the appellants' response thereto, which contains the following:

[Footnote continued]

that the Secretary of the Army takes the position that the Secretary of the Interior acted within his authority when he executed the ETSI contract.[9] *Id.*

The federal appellants concede, therefore, that the Secretary of the Interior unilaterally executed the ETSI water service contract. That the current Secretary of the Army expressed a belief that the Secretary of the In-

---

[8] [Continued]

14. The Secretary of the Army has not approved or executed a Water Service Contract with ETSI for use of water from Oahe.

Response: Plaintiff's statement in Paragraph 14 is technically correct, but the Corps did give express approval for the ETSI project to construct a water intake structure in Lake Oahe.

Response of Plaintiff-Appellees at 1. The appellees then point to the Findings of Fact entered by the Corps of Engineers' Omaha District Engineer when he issued the ETSI permit for construction of the water intake structure. The engineer stated:

> V. B. Section 6 of the Flood Control Act of 1944 (33 U.S.C. § 708) by its terms pertains only to contracts for certain uses of surplus water contained in reservoirs under the control of the Department of the Army. Issuance of the permit under consideration in these findings, * * * *would not constitute, or be tantamount to, such a contract.*

Response of Plaintiffs-Appellees to Order Dated Sept. 24, 1985, Exhibit 3 at 19 (Emphasis added). Together these statements support the conclusion that the Secretary acted unilaterally.

[9] The federal appellants specified that the Secretary of the Interior followed all the steps set out in the Memorandum of Understanding. They noted further that the memorandum did not require separate written approval by the Department of the Army of water service contracts. *Response of Federal Appellants* at 1. However, since the Memorandum of Understanding had expired when the Interior entered the ETSI contract, and since, in any case, it endorsed a *cooperative* role for both agencies, it is irrelevant to the validity of the Secretary of the Interior's unilateral action. This remains a question to be decided by examining his statutory authority.

terior had the authority to do so is irrelevant to the issue which we decide today: whether the Secretary of the Interior has the statutory authority to enter unilaterally into this contract. Having determined that the Secretary of the Army did not participate in execution of the ETSI contract, we now address this latter substantive issue.

II.

The appellants challenge the district court's holding that Oahe is not a reclamation development and that, therefore, section 9(c) of the Act cannot be invoked as authority for the Secretary's execution of the ETSI contract. They point out that section 9 of the Act incorporates the Pick-Sloan plan and, specifically, the provision in the plan which grants the Secretary of the Interior authority to regulate those functions of a project concerned primarily with irrigation. Thus, they argue, section 9 of the Act grants the Secretary jurisdiction over irrigation storage in Missouri River Basin reservoirs. They then conclude that the Reclamation Projects Act of 1939, incorporated by reference in section 9(c) of the Act, gives the Secretary the requisite industrial water marketing authority.[10]

---

[10] Section 9(c) of the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c) (1982) provides:

> The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; * * * *

A.

Our analysis of this issue must begin with the language of the Act. Where the statutory language[11] is clear, it ordinarily is conclusive. *United States v. Clark*, 454 U.S. 555, 560 (1982); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978); *Sierra Club v. Clark*, 755 F.2d 608, 615 n.9 (8th Cir. 1985). Section 9(a) of the Act provides that the comprehensive development plans set forth in Senate Document 247 (the Pick-Sloan plan) are approved by the Congress, and authorizes the Departments

---

[11] The relevant portions of section 9, subsections 9(a)-(c), are set out below:

Sec. 9.

(a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The geenral comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

Pub. L. No. 78-534, 58 Stat. 887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891.

of the Interior and the Army to begin development of these projects. Section 9(b) of the Act provides that the 1938 Missouri River Basin plan is expanded to include those projects under the Pick-Sloan plan which the Secretary of War is authorized to undertake. Section 9(c) of the Act then provides that the federal reclamation laws will govern the reclamation and power developments undertaken by the Secretary of the Interior under the Pick-Sloan plan.

A straightforward reading of section 9(a)-(c) of the Act indicates that this section does not attempt to delegate authority on the basis of storage for a particular use within a given development. The focus is on the "general comprehensive plans" proposed in the Pick-Sloan plan.[12] It envisions that each department will develop the projects which it undertakes in accordance with the applicable law and, specifically, that the reclamation laws will govern projects undertaken by the Secretary of the Interior.

The inquiry in this case then is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to section 9(c) of the Act. From his comprehensive findings on this question, the essential thrust of which remains unchallenged in this appeal, Judge Urbom concluded that Oahe is not a reclamation development. To the extent that his conclusion is based on findings of fact, we do not find it clearly erroneous. *Anderson v. City of Bessemer City*, 104 S. Ct. 1504, 1511 (1984). Further, we agree with the district court's interpretation of the Act which supports the conclusion that the Secretary of the Interior does not have the statutory authority which he seeks to exercise.

---

[12] Some of the developments proposed in the Pick-Sloan plan included projects in Garrison, North Dakota, and Oahe, Fort Randall, Big Bend and Gavins Point, South Dakota. Some of the specifications for these projects are itemized in the Pick-Sloan plan. J.A. at 442.

The district court offered three reasons for concluding that Oahe is not a reclamation development. First, the court found that Oahe was built by the Army Corps of Engineers and is, and always has been, maintained by it. *State of Missouri*, 586 F.Supp. at 1273. The appellants concede this point. They argue, however, that Oahe is in "a very basic sense" a reclamation development, ETSI Brief at 24, because it was built, in accordance with the Sloan plan, with a substantial capacity for irrigation storage, and because a substantial portion of its construction costs would be recovered under the repayment provisions of the reclamation laws. We are satisfied, as was the district court, that the existence of irrigation capacity in Oahe is insufficient to render it a reclamation development "undertaken by the Secretary of the Interior."

Second, the court found that Oahe's dominant purpose was flood control, and that it has not been used for irrigation purposes. *Id.* at 1274. The Court noted that the Secretary of the Interior ceased construction of irrigation works to tap the reservoirs' capacity in 1982, and has never attempted to use it for irrigation. *Id.* The court also noted that there is no separate storage allocation for irrigation in the Oahe reservoir. *Id.* We think that these findings reasonably indicated that, even though Oahe has multiple use capability, there has been no significant reclamation development and hence no colorable argument that Oahe was undertaken by the Secretary of the Interior. As the district court noted, the Department of the Interior has itself, in the past, acknowledged this fact:

> Even the Department of Interior has recognized repeatedly that Oahe is controlled by the Corps. In 1957, the department's assistant solicitor said that since his department had not built the main-stem dams, it did not consider them reclamation developments and was not depositing revenues from their

> electrical production into the reclamation fund. • • • A 1974 memorandum by the department's solicitor, upon which the department relied in asserting that it unilaterally could market Oahe's water, said that "the Corps has six dams and reservoirs on the Missouri River."

State of Missouri v. Colonel William Andrews, 586 F. Supp. at 1273 (citations omitted).

Finally, the district court determined that Congress did not intent to authorize coordinate jurisdiction over the Flood Control Act projects. The court stated:

> I am persuaded that Congress did not intend to create joint and coordinate jurisdiction over each dam. The statements of congressmen, Secretary of the Interior Harold Ickes, and officials of his department show that the basin's development was to be coordinated by assigning construction, operation, and control of each dam to the agency with the dominant interest in the dam: the Corps would build flood control dams and the Bureau would build those dams intended primarily for irrigation; *the Bureau's interest in the irrigation aspects of a flood control dam would be accommodated by letting the Bureau control the irrigation distribution system, not the water or storage space in the reservoir.*

Id. at 1275 (Emphasis added). The legislative history supports the court's findings and the conclusion that each dam was undertaken and controlled by the agency with the dominant interest.[13]

---

[13] In Senate discussion of the Act, Senator Overton concisely explained this development scheme:

> I endorse the statement made by the President of the United States. He undertakes to show a line of demarcation between reservoirs for reclamation and irrigation purposes and those built for flood control and navigation. One category is to be

B.

The appellants argue that the district court's focus on the words "undertaken by" reads the Pick-Sloan division of authority out of the Act, and improperly narrows the scope of the Bureau's authority. They emphasize that section 3(a)[14] of the Pick-Sloan plan accords each agency jurisdiction over main-stem reservoirs on a functional basis: The Army to determine capacities for flood control and navigation, and the Interior to determine irrigation capacity. They urge us to conclude that section 9 incorporates this functional division of authority and, thus, that the Secretary's jurisdiction turns on whether there is irrigation storage allocation in a main-stem reservoir. Under this broad interpretation the full range of the reclamation laws, including the power to enter industrial water service contracts, is available to the Secretary where there is irrigation storage in a main-stem reservoir. The salient inquiry, in their opinion, is the availability of irrigation storage.[15]

---

built by the Bureau of Reclamation, and the other by the Army engineers. * * *

> The projects in this bill are along the lines suggested by the President. * * * [T]here are no projects in this bill proposed to be constructed by the Army engineers in which the interests of flood control do not predominate, and in the rivers and harbors bill there are no projects in which the interests both of flood control and navigation are not the predominating and controlling factor.

90 Cong. Rec. 8625 (1944). Senator Mahoney, also discussing this division of authority, stated "* * * [I]t was the purpose to give to the [Department of the Army] jurisditcion over [Army] dams and improvements, and to the Bureau of Reclamation jurisdiction over those which were primarily to be used for reclamation * * *." 90 Cong. Rec. 8548 (1944).

[14] *See supra* p. 10-11.

[15] While we reject appellants' arguments on other grounds, we note that they face another problem. The Oahe reservoir does not have a separate storage allocation for irrigation. Rather, there

We do not accept the argument that the district court's construction reads out of the Act the division of function set forth in the Pick-Sloan plan. The Pick-Sloan language to which the appellants refer accommodates the interest of each department in determining, in multiple use main-stem and tributary reservoirs storage capacities for flood control and irrigation. Recognition of this accommodation does not do violence to the conclusion that a project, even though it entitled multiple use developments (most did), was undertaken—that is built, operated, and maintained—by the department within whose jurisdiction its primary use fell.[16] Section 9 of the Act

---

is a joint inactive storage for flood control, recreation, irrigation, municipal and industrial water, and power plants. *Water for Energy, Missouri River Reservoirs Final Environmental Impact Statement*, table 2-1 at P. 2-2. J.A. at 187.

[16] Both House and Senate discussions of the proposed Flood Control Act reflect the awareness that a given project undertaken by one department may entail some functional division of authority. Representative Curtis stated:

> The bill has a number of important features. This bill lays down the principle that all reservoirs constructed with Federal funds, which have storage space available for flood control, shall be operated under the regulations of the War Department. This is common sense. It is absolutely necessary if we are going to protect the property and the life of the people in the flooded areas. There must be a central agency operating the reservoirs. Likewise, this bill provides that whenever any reservoir is being operated by the War Department, it [sic] is found that there is available water for irrigating farm lands, that the Bureau of Reclamation, through the Secretary of the Interior, shall prescribe the rules and regulations for the operation of that part of the storage that is available for irrigation. In other words, *it gives the Bureau of Reclamation jurisdiction over the irrigation features of the reservoirs and the distribution systems.* I think this is sound and advisable. I am told by individuals in the Bureau of Reclamation that it is a definite gain for them and a step forward.

[Footnote continued]

simply adopts the projects proposed in the Pick-Sloan plan and directs that the reclamation laws apply to those undertaken by the Secretary of the Interior.

We also reject the appellant's contention that the district court impermissibly narrowed the Secretary's statutory authority by reading the statute to deny the Secretary of the Interior the authority to enter an industrial water service contract for water stored in an Army-controlled reservoir. We are convinced that other relevant provisions of the Act, as well as the legislative history of the Act, support the conclusion that the Secretary was never ceded the broad authority over irrigation stor-

---

[16] [Continued]

90 Cong. Rec. 4130 (1944) (emphasis added). Senator Overton's discussion of the jurisdictional question demonstrates a similar awareness:

> The testimony shows, I think rather conclusively, that the projects herein authorized to be constructed by the Army Engineers are ones in which flood control predominates over irrigation. Of course, the Senate will understand that, insofar as irrigation is concerned, all surplus water which can be used for irrigation is turned over to the Department of the Interior, and *the method of irrigation and the operation of the irrigation works* are under the control of the Department of the Interior.

90 Cong. Rec. 8625 (1944) (emphasis added).

Our recognition that a multiple purpose project may involve functional authority for both agencies does not concede appellants' argument that Congress intended to authorize coordinate jurisdiction. To arrive at the appellants conclusion, we must focus on the use of the words "reclamation features" above all other language in the record to conclude that authority was divided on the basis of storage. We believe that the language of the Act, and the predominant indications to the contrary in the record, directs otherwise. The opinions expressed above are reflected in the statutory scheme created, which ceded to the Secretary of the Interior the authority to build irrigation works in an Army undertaken reservoir to tap its irrigation capacities. We have no basis, however, to conclude that this authority extends, as is argued here, to use of irrigation *storage* for industrial purposes.

age in Army-controlled dams for which the appellants now argue.

Section 8 supports our determination that the Act does not grant the Secretary of the Interior plenary authority over irrigation storage in Army-controlled reservoirs. Section 8 allows the Secretary of the Interior, upon the Army's determination that any Army-controlled reservoir may be used for irrigation purposes, and upon specific authorization by the Congress, to construct, operate, and maintain "such additional works in connection therewith as he may deem necessary *for irrigation purposes.*" [17] (Emphasis added.) The additional works must

---

[17] Section 8 provides in full:

> Sec. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

Pub. L., No. 78-534, 58 Stat. 8887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891.

be built, operated, and maintained pursuant to the federal reclamation laws. The thrust of this provision is to make the reclamation laws applicable to irrigation benefits made available from irrigation works constructed in Army-controlled multiple-purpose reservoirs. The salient concern is to ensure that the details of the reclamation laws—addressing such matters as cost allocation and acreage limitations—apply to contracts for irrigation benefits from reservoirs undertaken by the Army.

Section 6 of the House Flood Control Bill, the counterpart to Section 8 of the Senate Bill, used significantly different language to accommodate the interest in having the Secretary administer irrigation works, under the federal reclamation laws, in Army-controlled reservoirs. It gave the Secretary of the Interior authority to prescribe regulations "for the use of the storage available for irrigation." [18] This language arguably encompassed a broader sphere of authority for the Secretary of the Interior, one more consonant with that for which he argues today.

In the Senate hearings on the Flood Control Bill, then Secretary of the Interior Harold Ickes proposed an amendment to section 6 to clarify that the reclamation laws were intended not merely to impose regulations,

---

[18] Section 6 provides:

> Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary can be consistently used for reclamation of arid lands, *it shall be the duty of the Secretary of the Interior to prescribe regulations under existing reclamation law for the use of the storage available for such purpose*, and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said storage; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts.

H. Rep. No. 4485 (1944) (emphasis added).

but to authorize "a system of contractual relationships." *Hearings Before the Subcommittee on Flood Control*, 78th Cong. 2d Sess. (1944). Secretary Ickes' proposed amendment was adopted as section 8 of the Act.

Secretary Ickes' amendment made two changes in the language of section 6 of the House Bill which are particularly significant to this dispute. First, it replaced the broad language dealing with regulation of "storage available for irrigation", with language authorizing the Secretary of the Interior to construct irrigation works under the provisions of the reclamation laws. Through this change the Secretary of the Interior attempted to make clear that the section governed irrigation works, including contracts for distribution of their benefits, not regulation of irrigation storage. Second, the amendment precisely states that the works authorized under section 8 of the Act are to be for irrigation purposes. By clearly emphasizing the boundaries within which the reclamation laws apply, the amendment carves out from what is otherwise an area of Army jurisdiction, a limited sphere of authority for the Secretary: the authority to administer, pursuant to the reclamation laws, irrigation works developed in Army-controlled dams.

This construction of section 8 belies the appellants' contention that section 9(c) of the Act already accorded the Secretary jurisdiction over irrigation storage in Army-controlled reservoirs. If, as appellants argue, all that is required for the reclamation laws to apply is the availability of irrigation storage, then section 8 of the Act is largely superfluous. One canon of statutory construction mandates that the provisions of a statute be construed to avoid redundancy. *Conway County Farmers Association v. United States*, 588 F.2d 592, 598 (8th Cir. 1978). Our reading of the statute avoids rendering section 8 superfluous. Section 8 clearly cannot be read as authorizing use of irrigation storage for industrial purposes and it supports our conclusion that section 9(c) di-

vides authority on a functional, not a storage allocation basis.

Secretary Ickes recognized that this limited jurisdiction did not encompass the authority to unilaterally market water for industrial purposes. In a letter to the Senate committee considering the flood control bill, Secretary Ickes attempted to broaden his authority to encompass the power to dispose of surplus water in a reservoir which, pursuant to section 8 of the Act, is utilized for irrigation purposes, for domestic or industrial purposes. He attempted to accomplish this through a proviso to section 4 of the House Bill, later enacted as section 6 of the Act,[18] and which grants the Secretary of the Army the authority to enter industrial water marketing contracts for surplus water stored in Army-controlled reservoirs. His arguments are instructive:

> A proviso should, in my opinion, be added to section 4 of the bill in order to assure that the disposition of water for domestic and industrial purposes, from reservoirs serving irrigation purposes as well, shall consistently with the irrigation provisions of section 6 of the bill, be handled pursuant to the Federal reclamation laws. While it is true that section 4 does not involve reclamation but covers merely the sale of water for domestic and industrial uses, it is true also that, in those situations where the disposition of water for irrigation purpose will be accomplished under the Federal reclamation laws, the disposition of water for domestic and industrial purposes should be accomplished under the same statutes in order to achieve efficient and economical administration. The Federal reclamation laws contain provisions specifically designated to meet this situation. I suggest therefore that the following proviso be added * * * [to] the bill: "*Provided.*

---

[18] Section 6 is quoted in full *supra* at 15.

> That the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water *from any reservoir utilized for irrigation purposes pursuant to section 6 of this Act.*

Senate Hearings on H.R. 4485, 78th Cong. 2d Sess., *reprinted in* 90 Cong. Rec. 9277, 9279 (1944) (emphasis added.) Secretary Ickes' proposal was not adopted. If we accept the construction of the statute which the Secretary of the Interior proposes, this proviso would be read into the Act, and expanded, to allow the Department of the Interior to market surplus irrigation storage for industrial purposes even where it has not taken the steps necessary under section 8 of the Act to bring this water under its regulations.[20]

We think it is persuasive that the Secretary of the Interior at the time the Act was passed, who participated significantly in the development of the Act, did not believe that this department had the authority which the appellants today assert.

---

[20] Our reading of the statute does not, as the dissent suggests, leave the irrigation storage in Oahe without an agency to administer it. Under section 8 of the Act the Secretary of the Interior may, with the requisite approval, develop irrigation works to use this storage for irrigation purposes. In this case, however, we deal with the Secretary's authority to market this water for industrial purposes. The Secretary of the Army retains the authority, pursuant to section 6 of the Act, to use any surplus water in Army-controlled reservoirs for domestic or industrial purposes.

We are aware of the Army Acting General Counsel's statement in his memoranda on Missouri River Water Marketing that the Army could not, under section 6, market the excess storage water in the main-stem reservoirs as surplus. The premise for that statement, however, was that the water not being used for irrigation, flood control, or navigation purposes was, at that time, run through generators to produce hydroelectric power. Technically, therefore, the water was being put to a lawful use and was not "surplus." *See Memorandum For The Chief, Office of Civil Functions,* Dec. 16, 1974. J.A. at 170.

The focus in section 8 on development of irrigation "works" also supports the conclusion that the Secretary of the Interior's authority in multiple use projects does not turn solely on the availability of irrigation storage. In this case, where Congress wanted to allow the Secretary jurisdiction over the irrigation developments in a reservoir undertaken by the Army, it required the Secretary to construct "additional works for irrigation purposes." [21]

Similarly, in two instances in which Congress intended to grant an agency control over water in storage, it did

---

[21] The appellants argue that the district court adopted an overly restrictive definition of "works." They rely on an opinion of the Attorney General, 41 Op. Att'y Gen. 377 (1958), which held that "works" should not be read to mean only actual developments undertaken. This opinion of the Attorney General stated that section 8 of the Act makes reclamation laws applicable for the disposition of irrigation benefits even if no addiitonal works were constructed to make these benefits available. *Id.* at 395. In section 390(11) of the 1982 amendments to the Reclamation Development Laws, Congress rejected this broad reading of the "works" requirement in section 8. The amendment limits the applicability of the reclamation laws under section 8 to (1) projects which have by federal statute explicitly been designated, made a part of, or integrated into, a Federal reclamation project; and (2) projects for which the Secretary of the Interior has provided project works for the control or conveyance of agricultural water supply for the lands involved. 43 U.S.C. § 390(11) (Supp. 1984). We believe that this amendment limits applicability of reclamation laws to the disposition of irrigation benefits pursuant to the development of additional works.

Environmental Defense Fund, Inc. v. Morton, 596 F.2d 848 (9th Cir. 1979), which upheld the Secretary of the Interior's authority to enter industrial contracts for water held in reclamation development reservoirs, is likewise inapplicable to this case. The contracts executed in *Morton* fell squarely within the Secretary of the Interior's authority as set forth in section 9(c) of the Act. The projects involved were "undertaken"—built, operated and maintained—by the Secretary of Interior and, therefore, the Secretary had the authority under section 9(c) of the Reclamation Development Act to enter industrial contracts for use of this water.

so clearly. Thus, section 6 of the Act authorized the Secretary of the Army to contract for domestic and industrial uses of surplus water available in any Army-controlled reservoir.[22] This provision limits the Secretary of the Army's ability to enter industrial water contracts by specifying that the rights of existing users must be preserved. The interpretation appellants urge would lead us to imply a similar right to the Secretary of the Interior. It seems incongruous, however, to hold that, in a statutory scheme which attempts to demarcate the jurisdiction of agencies with potentially competing interests, Congress would authorize both agencies to contract for water from the same pool for industrial purposes.[23] We do not believe that the statute or its legislative history supports this conclusion.

Again, in section 7 of the Act, Congress authorized the Secretary of the Army to "prescribe regulations *for the use of storage* allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds * * *." Pub. L. No. 78-534, 58 Stat. 887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891 (emphasis added). It is amply apparent that where Congress intended to ceed jurisdiction over water held in storage it did so clearly. Section 7 also indicates that Congress understood the distinction between projects "undertaken" by a particular department and those which merely have multiple-use capacities. Thus, section

---

[22] *See supra* p. 15.

[23] In discussing section 6 of the Act, Representative W[hitt]ington noted in its favor that it gave the Secretary of the Army the industrial water marketing authority in reservoirs undertaken by the Army, which the Secretary of the Interior had in reclamation developments. 90 Cong. Rec. 4134 (1944). This attention to the careful balancing of authority in the different kinds of projects cautions against a casual decision by this court finding independent authority in both agencies to enter industrial water contracts from the same body of water.

7 grants the Army jurisdiction over all flood control storage—regardless of which agency undertook its development.[24]

Based on our review of the Act and its legislative history, we conclude that the district court correctly held that the Secretary of the Interior does not have the statutory authority to unilaterally execute the ETSI contract. The Act provides a delicate balance of authority between two departments with overlapping, and somewhat conflicting interests. The dissent's concern appears to be that the Department of the Army will not adequately represent the competing interests of upstream and downstream users. Our role in interpretation of the statute does not, however, extend to mediation of these competing interests. While a different scheme may promote more efficient or more desirable administration of the Oahe storage, it is beyond our power to determine how the respective jurisdictional boundaries ought to be drawn. On these matters we must defer to legislative prerogative. Neither the statute nor its legislative history indicates that Congress intended the Secretary of the Interior to have unilateral authority to use water stored in Army-controlled reservoirs for industrial purposes.

III.

We now address the appellants' argument that the district court erred in its refusal to defer to the Secretary of the Interior's interpretation of the scope of his statutory authority. They argue that under *Chevron U.S.A. v. Natural Resources Defense Council*, 104 S. Ct. 2778 (1984), the court should defer to the Secretary's reasonable interpretation of his power under the Act. They also mantain that the Secretary asserted this authority in Senate hearings on Missouri River Basin water marketing.

---

[24] The statute does provide explicit exceptions to this broad grant of authority. *See*, Pub. L. No. 78-534, 58 Stat. 887, 890, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 890.

They urge that the fact that the Senate recommended no action to change or clarify the law in response to this assertion of authority indicates Congressional acquiescence on this point.

In *Chevron* the Supreme Court stated that courts must accord considerable weight to an agency's construction of the statutory scheme which it is entrusted to administer if "this [agency's interpretation] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* at 2783 (*quoting United States v. Shimer*, 367 U.S. 374, 382 (1961)). The *Chevron* rule requires deference only where an agency reasonably construes the applicable statute on a matter which is within its jurisdiction to decide. The limits of an administrative agency's statutory authority remains an issue suitable for judicial resolution. *Harmon v. Brucker*, 355 U.S. 579, 582 (1958); *Social Security Board v. Nierotko*, 327 U.S. 358, 368 (1946). "[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption of major policy decisions properly made by congress. * * * [Courts] must not rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrates the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority*, 104 S. Ct. 439, 444 (1983). *See also Granville House v. Dept. of Health, Education & Welfare*, 715 F.2d 1292, 1296 (8th Cir. 1983), *rev'd.* after remand, 772 F.2d 451 (1985); *State of Nebraska v. Federal Labor Relations Authority*, 705 F.2d 945, 948 (8th Cir. 1983).

Our review of the Act and its legislative history convinces us that Congress did not intend to grant the Secretary of the Interior the authority to unilaterally contract for water stored in an Army reservoir. We therefore affirm the district court's holding that the Secretary of the Interior's assertion of this authority is beyond his

statutory mandate and therefore not entitled to judicial deference.[25]

---

[25] The dissent focuses on *United States v. Bayview Homes, Inc.*, 106 S. Ct. 455 (1985), in arguing that our analysis misconstrues the appellate court's role in reviewing an agency's construction of the statute it administers. There is no conflict between the *Bayview* standard and our analysis here. A careful review of that case reveals why the deference appropriate on those facts is inappropriate in our case.

In *Bayview* the court was required to determine whether the Army Corps of Engineers' regulations interpreting "navigable waters" to include wetlands was proper under the Clean Water Act, 33 U.S.C. §§ 1251-1375. In determining that the agency's regulation deserved deference, the Court found (1) that Congress deliberately chose to define the waters covered by the Act broadly; (2) that in defining "navigable waters" to include wetlands, the Corps and the EPA employed their special technical expertise; and (3) that the scope of the Corps' jurisdiction over wetlands was *specifically brought* to Congress' attention and that Congress rejected measures to curb the Corps' jurisdiction. *Bayview*, 106 S. Ct. at 463-465.

We deal in this case with a statute delineating the respective jurisdiction of potentially competing agencies. Further, unlike the definitional issue requiring special technical expertise which the Court addressed in *Bayview*, the solicitor of the Interior Department's opinion, on which the Secretary of the Interior relies in this case, was a legal conclusion based solely on his reading of the statutory language—a function courts are capable of performing. Nor is the solicitor's interpretation of the statute as conclusively accepted as the dissent suggests. The Army Acting General Counsel's opinion to the contrary belies such a conclusion. *See supra* p. 11-12. Further, while the Department of the Army currently accedes to the validity of the ETSI contract, their response seems colored more by the fact that the Secretary of the Interior adhered to the form of the now expired MOU, than on an interpretation of Interior's statutory authority.

Finally, while the legislative history of the Act supports the conclusion that Congress intended to protect irrigation uses of Missouri River Basin Water, nowhere do we find support for the conclusion that this protection requires that the Secretary of the Interior have the power to market surplus irrigation storage in main-stem reservoirs for industrial purposes. Only a true exercise

Finally, we do not interpret Congress' failure to amend the statute in response to the MOU as constituting tacit acquiescence in the existence of the Department of the Interior's unilateral authority to enter the ETSI contract. The Supreme Court has held that a congressional committee hearing which is not contemporaneous with the passage of the statute does not conclusively establish legislative intent. *See SEC v. Sloan*, 436 U.S. 103, 120-21 (1978). In this case, while the MOU was discussed in the hearings, the basic issue under consideration was "whether the agreement between the two departments could preempt state water rights." *Hearings Before the Subcommittee on Energy Research and Water Resources on the Sale of Water from the Upper Missouri River Basin by the Federal Government for the Development of Energy*, 94th Cong. 1st Sess. 1 (1975) (opening Statement of Senator Abourezk). Senator Abourezk seriously questioned the legal authority for the marketing plan. The discussion in the record seems to target whether the legal authority rests with the states rather than the federal agencies. The Secretary of the Interior's authority in relation to the authority of the Secretary of the Army was not discussed. We think this record fails to show the degree of congressional approval necessary to override the intent of the 1944 Congress.

We affirm the district court's judgment.

---

of judicial creativity would allow us to extrapolate from protection of irrigation interests to inclusion under the reclamation laws of industrial uses of main-stem surplus storage.

BRIGHT, Senior Circuit Judge, dissenting.

I dissent.

By substituting its interpretation of the Flood Control Act for that of the Secretary of the Interior, the majority misconceives our limited role when reviewing an agency's construction of a statute that it administers. As the Supreme Court has repeatedly emphasized, "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 461 (1985).[1] The Secretary of the Interior reasonably construed section 9(c) of the Flood Control Act to provide that federal reclamation law governs the administration of irrigation water stored in the Oahe Reservoir. I would therefore reverse the district court's contrary holding and decide the remaining issues presented in this appeal.

Section 9(c) of the Flood Control Act provides that "reclamation and power developments to be undertaken by the Secretary of the Interior * * * shall be governed by the Federal Reclamation Laws." The Secretary of the Interior interpreted "reclamation developments" within this provision to include irrigation water stored within multipurpose reservoirs operated by the Army Corps of Engineers on the Missouri River. The Secretary concluded that the applicable reclamation laws authorized him to market the irrigation water for industrial use.[2]

---

[1] We must defer to an agency's reasonable interpretation even though it determines the agency's jurisdiction under the statute. *See United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. at 461-66 (1985).

[2] The district court did not determine and we do not decide whether the Secretary correctly construed his powers under the reclamation laws. We consider only whether the Secretary reasonably concluded that the reclamation laws govern the administration of the stored irrigation water.

Pursuant to section 9(c) and the reclamation laws, the Secretary executed contracts to supply ETSI with irrigation water held within the Oahe Reservoir, a multipurpose reservoir on the Missouri River operated by the Corps.

The thoroughness and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given the agency's interpretation. *See Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). The Secretary's interpretation of section 9(c) was first asserted by the Solicitor of the Interior Department in a 1974 opinion. In 1975, the Secretary of the Interior formally adopted the interpretation in a Memorandum of Understanding entered into with the Secretary of the Army. The Memorandum stated that the Secretary of the Interior could market excess irrigation water stored in the Army-controlled reservoirs on the main stem of the Missouri River. The parties informed a congressional subcommittee that the Secretary of the Interior gained such authority from the reclamation laws, which they contended applied to the stored irrigation water under section 9(c) of the Flood Control Act. *Hearings on the Sale of Water from the Upper Missouri River Basin by the Federal Government for the Development of Energy*, 94th Cong., 1st Sess[.] 1, 5 (1975). The Memorandum expired in 1978.[3]

Since 1975, therefore, the Secretary of the Interior has consistently interpreted "reclamation developments"

---

[3] The majority states that the Memorandum of Understanding has no relevancy in this action because it had expired when the Secretary executed the ETSI contract. *See* Majority Opinion at 17 n.9. However, the Memorandum does show that the Secretary of the Interior has consistently interpreted section 9(c) of the Flood Control Act to require application of reclamation laws to irrigation water stored in the Army-controlled main stem reservoirs. To that extent, therefore, the Memorandum of Understanding has great relevance to our examination of the Secretary's authority to enter the ETSI contract.

within section 9(c) to include irrigation water stored in multipurpose reservoirs on the Missouri River. We must give great weight to this long-standing and thoroughly reasoned construction. Consequently, we review the Secretary's interpretation only to determine whether it reflects a reasonable construction of section 9(c) in light of the language, policies, and history of the Flood Control Act of 1944. *Riverside Bayview Homes*, 106 S.Ct. at 461-62.

The Secretary's interpretation certainly represents a permissible construction of the language of the Flood Control Act. The Act nowhere defines "reclamation developments" as used in section 9(c). Further, it does not explicitly delegate control over stored irrigation and reclamation water to either the Army or the Interior. Indeed, the Act never specifically mentions such water. The Act therefore fails to reveal any clear and unambiguous intention of Congress to exclude irrigation water from the meaning of "reclamation * * * developments to be undertaken by the Secretary of the Interior" in section 9(c).

Despite an inability to identify the precise meaning that Congress attached to "reclamation developments," the majority asserts that several provisions of the Act reflect Congress' definite intent to foreclose the Secretary's interpretation. These provisions, however, also can be read consistently with section 9(c) as construed by the Secretary. Language open to such varying interpretations cannot be said to reveal Congress' "clear and unambiguous" intent, as the majority contends.[4]

---

[4] The majority, for example, finds great significance in Congress' specific delegation to the Army of control over water stored for flood control and navigation (section 7) and over surplus water not allocated for any use (section 6). *See* Majority Opinion at 32-33. The majority concludes that Congress would have also specifically granted the Secretary of the Interior jurisdiction over

Not only the words but also the legislative history of the Act fall far short of showing any unambiguous congressional intent to bar the Secretary of the Interior from asserting jurisdiction over irrigation water stored in Army reservoirs. *See Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 105 S.Ct. 1102, 1110 (1985) ("After examining the wording and legislative history of the statute, we agree with [the agencies] that the legislative history itself does not evince an unambiguous Congressional intention to forbid [the agencies' interpretation]."). Indeed, the evolution of the Flood Control Act strongly supports the interpretation of section 9(c) advanced by the Secretary of the Interior.

In the early forties, Congress requested the Army Corps of Engineers and the Interior's Bureau of Reclamation to develop plans for alleviating water problems facing the states in the Missouri River Basin. The Corps' study, the Pick Plan, focused primarily on reducing the flooding problems of the downstream states without depriving them of the Missouri's navigation benefits. *See* H.R. Doc. 475, 78th Cong., 2d Sess. (1944). In contrast, the Bureau of Reclamation's study, the Sloan Plan, directed most of its attention to guaranteeing a ready supply of irrigation water for the frequently drought-stricken

---

stored irrigation water had it intended the Secretary to exercise such control.

If we followed the majority's reasoning to its logical conclusion, no agency has jurisdiction over irrigation water stored in Army reservoirs because Congress did not expressly delegate such authority. Such a rigid and narrow reading of the Act finds little support in the Act's language and no support in its legislative history. An equally reasonable explanation for the lack of any specific delegation of jurisdiction to the Secretary of the Interior is that Congress believed that such jurisdiction was already sufficiently delegated in section 9(c). This explanation not only gives the Act internal symmetry and consistency, but also supports the interpretation of section 9(c) advanced by the Secretary of the Interior.

states in the upper Missouri Basin. *See* S. Doc. 191, 78th Cong. 2d Sess. (1944).

Both plans ultimately advised Congress to authorize construction of a series of dams and reservoirs along the Missouri River and its tributaries. Because the Corps and the Bureau of Reclamation represented different interests, their plans differed in matters such as the placement and size of the projects. Both agencies agreed, however, that the reservoirs should be administered such to "contribute most significantly to the welfare and livelihood of the largest number of people." H.R. Doc. 475 at 7; *see* S. Doc. 191 at 10.

The agencies suggested that, to achieve the greatest benefits, the reservoirs should serve a number of purposes, including flood control, navigation, and irrigation. H.R. Doc. 475 at 7; S. Doc. 191 at 10. And to assure that both the upstream and downstream states would share in the reservoirs' benefits, the agencies proposed that the Secretaries of the Army and Interior share in the reservoirs' control.

Under this concept of coordinate jurisdiction, the agency with the dominant interest in the reservoir would control its daily operations. For example, the Army Corps would operate those reservoirs intended primarily for flood control and navigation. To the extent that the Secretary of the Interior also had an interest in the reservoirs, the regulations of the Secretary would govern the administration of that interest. Therefore, the Secretary's regulations would control the administration of irrigation water stored in all multipurpose reservoirs.[5]

---

[5] The Chief of Engineers summarized the mechanics of this shared jurisdiction in a letter accompanying the submission of the Pick Plan to Congress:

> Tributory reservoirs should, when advisable from the standpoint of basin-wide development, be constructed, operated, and maintained by the agency with the dominant interest under

Because the Pick and Sloan Plans differed in some respects, Congress directed that a committee representing both agencies prepare a report reconciling the differences. In the resulting "Pick-Sloan Compromise," the only provision discussing control of the reservoirs reiterated the need for shared jurisdiction between the agencies:

> 3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:

> existing law. It is essential, however, that the main stem projects be built, operated, and maintained by the Corps of Engineers, and that utilization of storage reserved for flood control in all multiple-purpose reservoirs or tribut[a]ries be in accordance with regulations prescribed by the Secretary of War. * * * Conversely, utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior.

H.R. Doc. 475 at 3-4.

> The Sloan Plan echoed this division of authority:
>
> All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where flood control and navigation functions are minor, the reservoir should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. All irrigation features should be operated by the Bureau of Reclamation or its agents. All reservoirs in which irrigation, restoration of surface and ground waters, or powers, is dominant, should be operated by the Bureau of Reclamation. Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.

S. Doc. 191 at 11. In a letter commenting on the Sloan Plan and accompanying its filing with Congress, the Army Corps again emphasized that "[i]n all reservoirs, utilization of storage for flood control should be in accordance with regulations prescribed by the Secretary of War and utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior." *Id.* at 8.

> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tribut[a]ry reservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

S. Doc. 247, 78th Cong., 2d Sess. 1 (1944)

The Pick, Sloan, and Pick-Sloan Plans thus assumed that Interior regulations would govern irrigation water stored in multipurpose dams, and Army regulations would control water stored for flood control and navigation. Congress adopted the Pick and Sloan Plans, as reconciled in the Pick-Sloan Compromise, in section 9(a) of the Flood Control Act. Neither the Act nor its legislative history clearly rejects the plans' underlying assumption of coordinate jurisdiction. The Secretary could therefore reasonably conclude that "reclamation developments" within section 9(c) include irrigation water stored in the main stem reservoirs.[6]

As the Supreme Court recently observed, effectuating congressional intent will occasionally yield anomalies. *Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 689 n.7 (1986). Although nothing prohibits Congress from adopting unwise legislation, *id.*, we must not assume that Congress did so unless compelled by

---

[6] The majority contends that Congress' failure to adopt two proposed provisions that specifically provided that reclamation law applied to irrigation water strongly suggests that Congress did not intend for such law to apply. Once again, however, Congress' failure to pass the legislation can be also construed consistently with the Secretary's position, and therefore hardly constitutes compelling evidence of its intent.

a clear expression of congressional intent. The majority's interpretation of the Flood Control Act produces some very curious results. It leaves the irrigation water stored in the main stem reservoirs without a governing agency or law. *See supra* at 39 n.4. Consequently, the irrigation water stored in the vast Oahe Reservoir will sit unused and useless.[7] The Department of the Interior, representative of the irrigation interests of the upper basin states, will have no voice in the administration of the excess irrigation water. Instead, the Army Corps of Engineers, whose primary interests are in flood control and navigation, the same primary interests as the downstream states, will unilaterally regulate water in the largest federal reservoir in the Missouri Basin—a reservoir located in an upstream state and designed with the anticipation that its major consumptive use would be irrigation. Surely Congress did not intend such incongruous consequences.

In the absence of a congressional directive to the contrary, we must defer to the Secretary's reasonable interpretation of section 9(c) of the Flood Control Act. *See Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 105 S.Ct. at 1112. This deference seems particularily apt here, where the Army Corps of Engineers asserts no objection to the actions taken by the Secretary of the Interior. We should uphold the Secre-

---

[7] An essential difference between the majority and the dissent centers on whether water allocated for irrigation, but not yet used for that purpose, becomes "surplus water" under the Army's control pursuant to section 6 of the Flood Control Act. Although the majority contends that the stored irrigation water constitutes "surplus water," Majority Opinion at 30 n.20, the legislative history of section 6 indicates otherwise. The debates on section 6 indicate that Congress may have intended "surplus water" to include only water not allocated for other uses. *See, e.g.*, 90 Cong. Rec. 4133. The water here in question from the Oahe Reservoir is allocated for irrigation, and therefore apparently does not constitute "surplus water" under the Army's control.

tary's permissible construction, not indulge in judicial creativity by choosing between competing interpretations. I would therefore reverse the district court's ruling that reclamation law does not apply to the irrigation water stored in the Oahe Reservoir,[8] and address those remaining issues not decided by the majority because of its disposition of this appeal.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

---

[8] The majority observes that an "additional problem" exists because no specific allocation has been made concerning the amount of irrigation water stored in the Oahe. Majority Opinion at 24 n.15. The design of the reservoir as authorized by Congress, however, expressly stated that the Oahe Reservoir would contain water to irrigate 750,000 acres of land, as well as additional storage for flood control and other uses. *See* S. Doc. 247, 78th Cong., 2d Sess. 3 (1944) ("The Pick-Sloan Compromise") (codified at section 9(a) of the Flood Control Act of 1944). No party to this appeal contends that the 20,000 acre-feet of water per year included in the ETSI contract would even approach exhausting this allocation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-442

STATE OF MISSOURI, *et al.*,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants.

CV82-L-443

KANSAS CITY SOUTHERN RAILWAY CO., *et al.*,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants.

MEMORANDUM ON MOTIONS TO DISMISS
AND ON CROSS-MOTIONS FOR PARTIAL
SUMMARY JUDGMENT

[Filed May 3, 1984]

This memorandum concerns the issue of the authority of the Secretary of the Interior to sign a contract with

Energy Transportation Systems, Inc. (ETSI) which would allow ETSI to use water from Oahe Reservoir in a coal slurry pipeline. The complaints in both of these cases allege that the Secretary lacked authority to enter into the contract. The defendants have moved to dismiss these claims, and cross-motions for partial summary judgment also have been filed. Filings 57, 73, 93 and 143 in CV82-L-442 and filings 67, 70, 104 and 147 in CV82-L-443. The State of South Dakota, proceeding as amicus curiae, argues that the issue is irrelevant.

I. General History

The authority of the Secretary of the Interior depends on an interpretation of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, the single most important subject of which was the Missouri River Basin. The lower basin suffered severe floods in 1942, 1943 and 1944. Flood Control: Hearings on H.R. 4485 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. (1944), at 659-663 (testimony of Col. Miles Reber) (hereinafter cited as 1944 Hearings); H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944), at 24-25. Residents of the lower basin pressured Congress for flood control, and residents of the upper basin wanted reservoirs for storage of water for irrigation.

The basin's development concerned two agencies—the War Department's Corps of Engineers [1], which was responsible for flood control and navigation throughout the country, and the Bureau of Reclamation of the Department of the Interior, which was organized to reclaim the arid lands of the nation's seventeen western states. These different responsibilities produced some conflict between the two agencies over where the dams would be built, who would build them, how the resulting reservoirs

[1] In 1947, the Department of War became the Department of the Army. P.L. 80-253, § 205(a), 61 Stat. 495, 501. I shall use the two designations interchangeably.

would be used, and who would control them. The Corps wanted as much empty storage space as possible to hold back flood waters and to use stored water during droughts to maintain the Missouri below Sioux City at a level high enough for navigation and sewage disposal. The Bureau wanted as much full storage space as possible for irrigation, especially during long droughts.

The Corps' plan for the basin, H.R. Doc. No. 475 (the Pick Plan) proposed building five dams on the main stem of the Missouri River below Fort Peck Reservoir in Montana, including six million acre-feet reservoirs at Oahe and Oak Creek in South Dakota. The dams were to be used for flood control, navigation, irrigation, and power production, while a number of very small flood control dams were to be built on the Missouri's tributaries. *Id.*, at 28, 29.

The Bureau's report (the Sloan Plan) disagreed with the Pick Plan as to where the dams should be built, 1944 Hearings, at 516-518 (testimony of W. G. Sloan); Sen. Doc. No. 191, at 115-118, and as to the size of Oahe Dam. The Sloan Plan proposed a 19.6 million acre-feet Oahe Reservoir which would have flooded out the Oak Creek Dam and furnished water for irrigation of 750,000 acres in South Dakota's James River Basin, navigation, and power production, as well as flood control. Sen. Doc. No. 191, at 115.

Although the parties disagree on the seriousness of the conflict between the Corps and the Bureau, it is impossible and unnecessary to characterize accurately the agencies' relationship. No matter how bitter the dispute may have been, the agencies never disagreed over who was to build and control the main stem dams. The Pick Plan assigned those duties to the Corps of Engineers. H.R. Doc. No. 475, at 31. Maj. Gen. Reybold, the Chief of Engineers, told Bureau Commissioner H. W. Bashore that Corps' control of those dams was essential. Sen. Doc. No. 191, at 7. Bashore's formal commentary on the

Pick Plan said that the main stem dams should be "constructed, operated, and maintained by the Corps of Engineers" because of "their peculiarly close relationship with flood control and navigation." H.R. Doc. No. 475, at 7; see, also, Letter of H. W. Bashore to the Secretary of the Interior, reprinted in Sen. Doc. No. 191, at 4. The Bureau's Board of Review recommended that the Corps operate all reservoirs where flood control and navigation dominated; it also recommended that the Bureau operate all "irrigation features" and that where a reservoir's irrigation function was minor compared with flood control, it should be operated "under regulations of the Bureau" as far as irrigation was concerned. Sen. Doc. No. 191, at 11.

During Senate committee hearings on the Flood Control Act, representatives of the Corps and the Bureau met to reconcile their differences. The resulting document was called the Pick-Sloan Plan, Sen. Doc. No. 247, 78th Cong., 2d Sess. (1944). Two parts of the plan are relevant here. First, it recommended the high Oahe dam proposed by the Bureau. *Id.* at 3. The Corps had proposed low dams at Oahe and Oak Creek because it did not believe the ground at Oahe could provide a strong enough foundation for a high dam. When the Bureau's surveys reached the opposite conclusion, the Corps endorsed the high dam and said the extra storage should be used for irrigation, flood control, and navigation. 1944 Hearings, at 508, 518 (testimony of Col. Reber); at 518 (testimony of W. G. Sloan); at 594 (testimony of Rep. Case). The plan said that the high dam would supply water for irrigation in the James River Basin, flood control, navigation, and power production. Second, the Pick-Sloan Plan's only discussion regarding control was the following:

> "3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:

(a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control.

(b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

(c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water."

Sen. Doc. No. 247, at 1

Ultimately, in § 9(a) of the Flood Control Act, Congress adopted the Pick and Sloans Plans "as revised and coordinated" by Sen. Doc. No. 247 and authorized construction by the Departments of War and the Interior. P.L. 78-534, § 9(a), 58 Stat. 887, 891. Section 9(b) of the Act expanded earlier flood control acts to include those works authorized in § 9(a) which were to be built by the War Department. Section 9(c) said that the developments to be undertaken by the Interior Department were to be governed by the federal reclamation laws. Although § 9 concerned only the Missouri River Basin, § 10 authorized construction projects throughout the country, which were to be built by the Corps. Sections 4 through 8 allocated control of all the projects authorized in the Act. Section 4 permitted the Secretary of War to build and operate recreation facilities at reservoirs under his control; § 5 said that electricity generated at projects controlled by the War Department was to be turned over to the Interior Department for sale to the public; § 6 authorized the War Department to furnish water from Corps reservoirs for domestic and industrial use; § 7 required the War Department to prescribe regu-

lations for the use of storage allocated at all federal dams for flood control and navigation; § 8 said that if the War Department determined that a dam it operated could be used for irrigation, the Secretary of the Interior was to build and control the works needed to distribute that water, under the provisions of the reclamation laws.

Pursuant to §§ 9(a) and 9(b), the Corps finished construction of the Oahe Dam in 1962. 128 Cong. Rec. S8479 (daily ed. July 16, 1982) Table II. The Corps always has operated and maintained all of the main stem dams and reservoirs on the Missouri. Letter of Col. C. A. Selleck, Jr. to E. R. Wilde, October 4, 1978, filing 337 in CV82-L-442, Administrative Record Document No. 900399; 1975 Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army, February 24, 1975, Admin. Rec. Doc. No. 900072, reprinted in Missouri River Basin Industrial Water Marketing: Hearings before Senate Committee on Interior and Industrial Affairs, 94th Cong., 1st Sess. (1975), Part 1, at 10-11 (hereinafter cited as 1975 Hearings). The Interior Department did not begin construction of the Oahe irrigation works described in the Sloan Plan until after 1968 and construction later was halted.

In response to the energy crisis of 1973 and 1974, the federal government began plans to develop the large deposits of coal, oil, and gas in eastern Montana and Wyoming. 128 Cong. Rec. S8482 (daily ed. July 16, 1982) (statement of Sen. Wallop). The government thought that the main stem reservoirs could supply the water needed for this development. Report of the Ad Hoc Committee on Water Marketing, July 1, 1974, Admin. Rec. Doc. No. 900336, at 5. The Bureau and the Corps agreed that one million acre-feet of water could be made available each year for industrial use from the main stem reservoirs. 1975 Hearings, at 6. On February 24, 1975, the Secretary of the Army and the Secretary of the Interior signed a "Memorandum of Understanding" de-

signed to expedite the use of water for energy development in the Missouri River Basin. Admin. Rec. Doc. No. 900072; 1975 Hearings, at 10-11. The memorandum said that the Interior Department would determine the amount of water available from the main stem reservoirs for irrigation and the extent to which that water would not be needed for irrigation; the Army then would determine how much of that excess water could be made available for industrial uses. Admin. Rec. Doc. No. 900072, at 1. The Secretary of the Interior was authorized then to contract for that water, on terms acceptable to it and the Army. *Id.* The memorandum was to last two years, *id.* at 2, but because of an extension, it did not expire until December 31, 1978. Letter from the Commissioner of the Bureau of Reclamation to the Assistant Secretary for Land and Water Resources, November 5, 1980, Admin. Rec. Doc. No. 900241, at 1. The Corps, in refusing to agree to another extension, pointed out that industrial water no longer was needed urgently and that the Interior Department had not executed a single contract for water delivery under the memorandum. Letter of Col. Selleck to E. R. Wilde, October 4, 1978, supra. However, the Interior Department later announced that it intended to contract unilaterally for service of up to one million acre-feet of water for industrial uses from the main stem dams. Admin. Rec. Doc. No. 900241, at 1.

ETSI had expressed interest in water from Oahe long before the memorandum of understanding had expired. On December 5, 1973, ETSI asked the Corps for permission to remove 75,000 acre-feet of water annually from Oahe for use in a coal slurry pipeline, 1975 Hearings, at 10, and on December 18, 1974, ETSI made a similar request to the Bureau, 1975 Hearings, at 9. On July 2, 1982, the Secretary of the Interior and ETSI executed an "Industrial Water Service Contract." Admin. Rec. Doc. No. 900331. The contract said ETSI had received a conditional water permit from the South Dakota Conservancy District for an annual diversion of 50,000 acre-feet

from Oahe Reservoir and that ETSI now sought the Interior Department's approval for diverting 20,000 of the acre-feet awarded by the conditional permit. Although the contract said that this decision had been reached "after consultation with the Secretary of the Army," it did not say whether the Army favored or opposed the contract. The contract was to last forty years and said that the water was to be used in a coal slurry pipeline. At the time the contract was signed, neither the Army nor the Interior Department had executed any contracts for the use of water from the main stem reservoirs for irrigation purposes. 128 Cong. Rec. S8477 (daily ed. July 16, 1982) Table I, n. 3.

The issue now before me is whether the Secretary of the Interior had the authority to execute the ETSI contract. But before I address that issue I must consider South Dakota's amicus curiae briefs, which contend that the federal government cannot "sell" water but can only "contract for" water. Representatives of western states have resisted the former term, because they believe it implies that the United States owns the water. 90 Cong. Rec. 8231 (statement of Sen. Millikin), 128 Cong. Rec. S8482 (daily ed. July 16, 1982) (statement of Sen. Wallop); but see 90 Cong. Rec. 8231 (statements of Reps. Overton and White). Solely to avoid needless controversy, I shall avoid the term "sell." The existence of such a propriety interest is not in question here. South Dakota's assertion that it owns and absolutely controls the water in Oahe Reservoir ignores the federal government's interest in exercising some control over water, see *California v United States*, 438 U.S. 645, 668, n. 21, 679 (1978), the relation to navigable streams to interstate commerce, the federal government's sizable investment in the construction and operation of Oahe Reservoir, and the Flood Control Act's express grants of authority to federal agencies in regard to dams built by the federal government. Because the United States has an interest in controlling Oahe Reservoir, South Dakota cannot successfully argue

that the issue of which federal officials may exercise that control is irrelevant.

II. Substantive Merits

A.

The plaintiffs argue that nothing in the Flood Control Act permitted the Secretary of the Interior to sign the contract with ETSI. The defendants contend that § 9(c) of the Flood Control Act, coupled with § 9(c) of the Reclamation Project Act, P.L. 76-260, 53 Stat. 1187, 1194 (1939), authorized the Secretary's action. The contract itself says that it was authorized by those two sections. Admin. Rec. Doc. No. 900331, at 1. Section 9(c) of the Reclamation Project Act allows the Secretary of the Interior to enter contracts to furnish water for municipal or miscellaneous purposes [2], subject to certain repayment requirements. The Flood Control Act, after adopting the Pick, Sloan, and Pick-Sloan plans in § 9(a), says in § 9(c) that "the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws," including the Reclamation Project Act of 1939. The defendants argue that § 9(c) of the Flood Control Act incorporates the Reclamation Project Act's provision which allows the Interior Department to furnish water for miscellaneous purposes from dams built under the Flood Control Act.

At least two courts have accepted this incorporation theory in regard to dams built by the Bureau of Reclamation. In *Environmental Defense Fund, Inc. v Morton*, 420 F. Supp. 1037, 1040-1043 (U.S.D.C. Mont. 1976), the court allowed the Bureau to furnish water for industrial purposes from the Yellowtail and Boysen Reservoirs,

---

[2] The parties disagree on whether a coal slurry pipeline is a miscellaneous use as contemplated by the Reclamation Project Act. My disposition of the authority issue makes resolution of this secondary question unnecessary.

which the Bureau had built as reclamation developments under the Flood Control Act. The court's opinion said that "miscellaneous purposes" included industrial use, and pointed out that the department had told Congress that it was selling water from its Flood Control Act dams for such purposes and Congress had not halted the practice. The district court's ruling on this issue was affirmed on appeal, although other parts of the decision were reversed. *Environmental Defense Fund, Inc. v Andrus*, 596 F.2d 848, 850 (C.A. 9th Cir. 1979).

This holding, however, concerned only dams built by the Bureau of Reclamation. Although the defendants contend that the holding also applied to the Missouri River's main stem dams, the appellate court's statement of the controverted issues referred only to the Yellowtail and Boysen Reservoirs. *Id.*, at 850. The district court's opinion discussed only those two projects, which are in the Yellowstone Basin, and projects built in the Upper Missouri River Basin. 420 F. Supp. at 1041-1042. Neither basin contains the main stem dams built by the Corps. See Sen. Doc. No. 191, at 49-50, 53, 54-55. Furthermore, even an intentional reference to the main stem dams would have been dictum. As far as I know, no court has ever considered whether the Flood Control Act and the Reclamation Project Act should be read together to allow the Interior Department to furnish water for industrial purposes from a main stem reservoir such as Oahe.

B.

Three factors persuade me that Oahe Dam was not a reclamation or power development to be undertaken by the Secretary of the Interior pursuant to § 9(c) of the Flood Control Act but was built under § 9(b), which concerned projects to be built by the Corps.

First, Oahe Dam was built by the Corps, and the dam and reservoir always have been operated and maintained by the Corps. In 1944, the Corps and the Bureau agreed

that the Corps was to build, operate, and maintain Oahe because of its importance to flood control and navigation. H.R. Doc. No. 475, at 7; Sen. Doc. No. 191, at 4, 7. Proponents of the Flood Control Act said the Corps should build and control those dams in the basin which were primarily for flood control and navigation, 90 Cong. Rec. 8315, 8625 (statements of Sen. Overton), 9282 (statement of Rep. Whittington). There is no dispute that the Corps built Oahe.

Even the Department of Interior has recognized repeatedly that Oahe is controlled by the Corps. In 1957, the department's assistant solicitor said that since his department had not built the main stem dams, it did not consider them reclamation developments and was not depositing revenues from their electrical production into the reclamation fund. Missouri Basin Water Problems: Joint Hearings before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Public Works, 85th Cong. 1st Sess. (1957), Part 2, at 318, 319 (hereinafter cited as 1957 Hearings) (testimony of Edward Weinberg). A 1974 memorandum by the department's solicitor, upon which the department relied in asserting that it unilaterally could market Oahe's water, said that "the Corps has six dams and reservoirs on the Missouri River." Letter of the Solicitor to the Secretary of the Interior, November 27, 1974, at 2, Admin. Rec. Doc. No. 900065. The 1975 Memorandum of Understanding, signed by the Secretary of the Interior, says that the Army was to "retain all operational and managerial control" over the main stem reservoirs, Admin. Rec. Doc. No. 900072, at 1, and even the ETSI contract says that the Corps "constructed and is operating" Oahe. Admin. Rec. Doc. No. 900331, at 1. Except for the fact that the Bureau investigated the feasibility of erecting a high dam at Oahe by conducting surveys and exploratory drillings, see 1944 Hearings, at 508 (testimony of Col. Reber), and 517-518 (testimony of W. G. Sloan), the defendants have not pointed to any evidence that the In-

terior Department has assisted in the construction, operation, or maintenance of the Oahe Dam and Reservoir. All the evidence before me is that Oahe was undertaken by the Army, not by the Interior Department, and therefore is not covered by § 9(c).

The second factor is that Oahe's dominant purpose was flood control, and it has not been used for irrigation. The Sloan Plan said that Oahe should be used to irrigate 750,000 acres of land in the James River Basin of eastern South Dakota. Sen. Doc. No. 191, at 115-116. The Sloan Plan did not say who would build the necessary irrigation works or when they would be built. The Pick-Sloan [P]lan said merely that Oahe was to "be developed in accordance with" the Sloan Plan. Sen. Doc. No. 247, at 6. The Corps finished the main dam in 1962, as I have said, but the Interior Department did not begin work on the irrigation works until sometime between 1968 and 1975. See Act of August 3, 1968, P.L. 90-453, 82 Stat. 624, 625; 1975 Hearings, at 9. Congress later authorized the Interior Department to cancel construction, WEB Rural Water Development Project Act of 1982, P.L. 97-273, § 3(a)(1) and § 4, 96 Stat. 1181, 1182, and South Dakota opposes any further construction, S.D. Cod. Laws Ann. § 46A-1-78 (1983). As of 1982, there were no contracts in effect for water diversions from the main stem dams by any private irrigators, 128 Cong. Rec. S8477 (daily ed. July 16, 1982), Table I, n. 3, and there is no evidence that any Oahe water ever has been used for irrigation or will be in the near future. Indeed, only two years ago, when Senator Patrick Moynihan asked Congress to declare that the federal reclamation laws applied to all the reservoirs which the Corps had built, he exempted all of the main stem Missouri projects—including Oahe—from the scope of his unsuccessful proposal. 128 Cong. Rec. S8475 (daily ed. July 16, 1982). From the evidence before me, I find no basis for my considering Oahe to be a reclamation development.

The defendants contend that there are several reasons to consider Oahe as a reclamation development. ETSI argues, first, that only a small part of the Oahe Reservoir is needed for flood control and navigation and a much larger part was allocated for irrigation. To support this ETSI cites Col. Reber's testimony that only twenty million of the sixty million acre-feet of storage in the main stem reservoirs is needed for flood control. But ETSI fails to provide any statistics which show that a majority of storage at Oahe—instead of the main stem reservoirs as a whole—is devoted to irrigation, and I do not know that any such statistics exist. The 1976 storage allocation for Oahe said that 5.5 million acre-feet was in "Inactive" storage, 1.1 million acre-feet exclusively for flood control, 3.2 million acre-feet for "Annual Flood Space and Multiple Use," and 13.7 million acre-feet for "Carryover Multiple Use." "Water for Energy: Missouri River Reservoirs Final Environmental Impact Statement," filing 202 in CV82-L-442, Exhibit 1, at 2-2, Table 2-1. The table lumps navigation, power, and irrigation storage together. Furthermore, Congress and the Bureau of Reclamation considered flood control and navigation to be Oahe's dominant purposes, regardless of how much storage space those uses require. See 1944 Hearings, at 611 (statement of Sen. Overton); 90 Cong. Rec. 8625 (statement of Sen. Overton) (Corps to build only flood dams whose primary purpose is flood control); H.R. Doc. No. 475, at 7 (letter of H. W. Bashore). See, also, 1944 Hearings, at 671 (statement of Col. Reber) (amount of storage needed for a particular use does not establish the priority of that use). And, even if Oahe was an irrigation development, it was not undertaken by the Interior Department.

ETSI also argues that most of the costs and benefits of developing the basin were attributable to irrigation. But ETSI's statistics are for the entire basin, so they include the many irrigation dams built on the Missouri River's tributaries. Actually, only 18.1 per cent of Oahe's

cost was allocated to irrigation. 128 Cong. Rec. S8479 (daily ed. July 16, 1982) Table II.

The defendants also contend that Oahe is a reclamation development undertaken by the Interior Department because the Pick-Sloan Plan and the Flood Control Act gave the Bureau and the Corps joint and coordinate jurisdiction over the main stem dams, with control allocated by function, pointing out that the Act's legislative history repeatedly says that the Interior Department is to regulate irrigation storage in reservoirs built by the Corps. They also observe that the Pick-Sloan Plan's sole discussion of control says that the Bureau should determine the main stem reservoirs' capacity for irrigation. Sen. Doc. No. 247, at 1. Col. Reber's testimony indicates that if the Corps were to be allocated a specific amount of storage space for its purposes, while the Bureau were to receive specific space for irrigation, the two agencies could operate independently, 1944 Hearings, at 729, but he also said that divided control of a reservoir would be impractical. Rivers and Harbors Omnibus Bill: Hearings before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. (1944), Part 1, at 1242.

I am persuaded that Congress did not intend to create joint and coordinate jurisdiction over each dam. The statements of congressmen, Secretary of the Interior Harold Ickes, and officials of his department show that the basin's development was to be co[o]rdinated by assigning construction, operation, and control of each dam to the agency with the dominant interest in the dam: the Corps would build flood control dams and the Bureau would build those dams intended primarily for irrigation; the Bureau's interest in the irrigation aspects of a flood control dam would be accommodated by letting the Bureau control the irrigation distribution system, not the water or storage space in the reservoir.

Although many people discussed the division of control over the main stem reservoirs, nobody said that the

Bureau's level of control over certain water stored for irrigation in Corps-built dams was so complete that the Bureau could furnish that irrigation water for nonirrigation purposes—i.e., industrial or miscellaneous uses. Indeed, as I shall discuss later in more detail, Secretary Ickes expressly distinguished irrigation and industrial uses. 1944 Hearings, at 312. It also is significant that nobody said that the Bureau was to have complete control over a specific block of water which had been reserved for irrigation in a reservoir built by the Corps; the strongest support for that proposition is Rep. Whittington's statement that reclamation storage should "be under the supervision of the Interior Department." 90 Cong. Rec. 4127. In contrast, there were many statements which gave authority over flood control dams to the Corps of Engineers. The Bureau itself said that the main stem dams "should be constructed, operated and maintained by the Corps of Engineers." Letter of H. W. Bashore, H.R. Doc. No. 475, at 7. Senator Overton, the Flood Control Act's primary sponsor in the Senate, explained:

> "Someone must have control of a dam. If it is a flood-control or navigation dam, the Secretary of War has charge of it, and if it is an irrigation dam, the Secretary of Interior has charge of it."

90 Cong. Rec. 8315. See, also, 90 Cong. Rec. 8245 (statement of Sen. Overton). Senator O'Mahoney said:

> "The flood-control policy envisaged the construction of vast new works which would store great amounts of water, over which the War Department and the Army engineers would have jurisdiction. . . . [S]o far as the War Department is concerned, it should have jurisdiction over those works which are to be constructed primarily for flood control, but if they store surplus water, such waters should be made available for any purpose. . . ."

90 Cong. Rec. 8548. Neither senator qualified his statements or implied that the Interior Department had any authority over the water in reservoirs built by the Corps. Senator O'Mahoney did say that surplus water should be made available for any use, but he did not say that the Interior Department was to make it available.

The main support for the defendants comes from the statements of several congressmen that the Interior Department should prescribe regulations for irrigation storage in reservoirs operated by the Corps. See 90 Cong. Rec. 4130 (statement of Rep. Curtis); 1944 Hearings, at 527 (statement of Maj. Gen. Reybold); 90 Cong. Rec. 4127 (statement of Rep. Whittington).

Section 6 of the House version of the Flood Control Act used the same language. Section 5 of the House bill applied the same language to a parallel situation and said that the War Department was to prescribe regulations for the use of flood control storage in all federal reservoirs. See 1944 Hearings, at 2.

However, Interior Secretary Ickes requested that Congress abandon that language. He said that § 6 of the House bill contained provisions which were "not entirely apt in their relation to the various technical features of the Federal reclamation laws" and he asked Congress to adopt a new section which said that when the Secretary of War determined that a new reservoir could be used for irrigation, the Secretary of Interior was authorized to "construct, operate, and maintain under the provisions of the Federal reclamation laws . . . such additional works in connection therewith as he may deem necessary for irrigation purposes." 1944 Hearings, at 313. Congress adopted Ickes' proposal as § 8 of the final Flood Control Act.

The difference between the two sections is striking: the former allows regulations about storage; the latter permits construction and operation of irrigation works

which are added to a Corps-operated reservoir. The focus shifts from water in the reservoir to water that has been removed from the reservoir. Furthermore, § 8 concerns only dams and reservoirs "operated under the direction of" the Army, indicating that the Army retains control of the water still in the reservoir.

It is significant that § 5 of the House bill, which required the War Department to prescribe regulations for flood control storage, was adopted without change as § 7 of the Flood Control Act. The implication that the authority to operate irrigation works and the authority to prescribe regulations are different is reinforced by the fact that the Department of the Army has prescribed regulations for the use of flood control storage at Bureau-built dams, 33 C.F.R. § 208.11, while, to my knowledge, the Code of Federal Regulations does not contain any Interior Department rules for the use of irrigation storage in reservoirs built by the Corps.

The defendants argue that Secretary Ickes would not have proposed new language that would have reduced his authority. This assumes that Ickes believed he enjoyed the authority which his successors now claim, but his statements on the subject are quite inconsistent with that assumption, as I shall explain later. Moreover, the purpose of his proposal was to clarify and affirm his authority to impose the new reclamation laws' acreage restrictions and repayment requirements on California landowners who were irrigating with water from reservoirs built by the Corps. *United States v Tulare Lake Canal Co.*, 535 F.2d 1093, 1106-1107 (C.A. 9th Cir. 1976), cert. denied 429 U.S. 1121 (1977). He did not need to control the irrigation storage to accomplish this purpose. Indeed, it is not clear that such control would have been helpful. His purpose was best accomplished by his new language, which said that water from Corps reservoirs could be used for irrigation only through irrigation works and distribution systems built by the Bureau under the reclamation laws, and his plan succeeded, see, e.g., 41 Op.

Atty's Gen. 377 (1958); *Tulare Lake Canal Co.*, supra; 43 U.S.C. § 390*ll*(a)(2), although recently Congress has said that such restrictions do not apply in certain circumstances. 43 U.S.C. § 390*ll*(a).

My reading of Secretary Ickes' proposal, whereby the Secretary of War was to control the water in reservoirs built and operated by the Corps and the Secretary of the Interior was to control the additional irrigation works used to distribute the water, is consistent with a number of congressional remarks that the Interior Department was to control irrigation features or works. See, e.g., 1944 Hearings, at 457 (statement of Secretary Ickes); 90 Cong. Rec. 9282 (statement of Rep. Whittington); 90 Cong. Rec. 8245, 8625 (statements of Sen. Overton). It is also consistent with § 8's requirement that the Secretary of War must determine that the reservoir can be used for irrigation before the Secretary of Interior can build any irrigation works. If the Interior Department already controlled certain water in the reservoir because the reservoir had been built for flood control, navigation and irrigation, why should be it [sic] required to seek the War Department's approval to use that water?

My interpretation is also consistent with the control scheme proposed by the Bureau's Board of Review in the Sloan Plan. Sen. Doc. No. 191, at 11. The board said that the Corps should operate all reservoirs where flood control and navigation dominated, while the Bureau should operate all "irrigation features." *Id.* "Irrigation features" must mean the irrigation works built by the Bureau after the Corps finished the main dam; interpreting the phrase to include stored water and water storage space would conflict with the board's express statement that the Corps was to operate all reservoirs where flood control was the dominant purpose. I note that the board's suggestion that the Bureau prescribe regulations for irrigation storage was rejected when Secretary Ickes' replacement language was adopted.

In short, the congressional proceedings show that Congress intended the Corps to build, operate, and control the main stem reservoirs, while the Bureau was to build, operate, and control the irrigation works and distributions systems attached to those reservoirs.

The second major part of the defendants' argument regarding control of water stored for irrigation in reservoirs built by the Corps is based on the premise that the main stem reservoirs, including Oahe, contain water that has been stored for irrigation purposes but which will not be used for irrigation in the near future. The argument seems to be that once water storage is reserved or allocated for irrigation, the Interior Department assumes and retains control of that space and the water within it. As I recall Secretary Ickes' comment that industrial uses of water are not considered to be reclamation or irrigation uses, 1944 Hearings, at 312 I find it curious that the Interior Department is arguing, in effect, that having obtained control of certain water because of the water's intended use for irrigation, it can abandon that use (in the sense that no Oahe water has ever been used for irrigation and the Department does not expect that any will be used for irrigation for some time) and then use that water for a nonirrigation purpose.

The defendants have not pointed to any evidence which would show that specific storage space in Oahe Reservoir was assigned to irrigation. Instead, Col. Reber testified that in a multiple-purpose dam, a single block of water is allocated for navigation, power production, and irrigation together, 1944 Hearings, at 729, and statistics on storage allocation show this was done at Oahe. See "Water for Energy," supra, at 2-2, Table 2-1; 128 Cong. Rec. at S8479-8480 (daily ed. July 16, 1982) Table II. Earlier I said that joint coordination over a reservoir was possible if separate storage space was alloted for each purpose, but there is no evidence that separate al-

locations were made at Oahe. I also note that the defendants' briefs, when discussing the water which the Interior Department allegedly controls, refer to different blocks of water. See ETSI brief of February 3, 1983, at 19 (one million acre-feet of water in the main stem reservoirs allotted for industrial use by the Bureau and Corps in 1975), and at 14 (indeterminate amount of water intended but never used for irrigating the James River Basin); federal defendants' brief of March 15, 1983 (indeterminate amount of water stored in the main stem reservoirs for irrigation); ETSI brief of December 2, 1983 (indeterminate amount of water reserved in Lake Oahe for irrigation purposes). These terms do not describe the same body of water, and one wonders how the Interior Department is to control what cannot be identified.

The more important point is that while Congress undoubtedly thought that some of Oahe's water would be used for irrigation, that intent and any allocation of storage space for irrigation purposes are material only to the extent that they show that Oahe is a reclamation or power development undertaken by the Secretary of the Interior. See § 9(c), Flood Control Act. The implied argument that the Interior Department's reservation of storage space for irrigation in a reservoir built by the Corps of Engineers can constitute a reclamation development undertaken by the Secretary of the Interior does not persuade me. The Secretary of the Army undertook and developed Oahe; his department built it, always has operated it, and always has maintained it. The Secretary of the Interior, at best, merely said that some of the space in the reservoir built and operated by the Army should be available for irrigation. I say "at best," because there is scant evidence that the Secretary of the Interior ever took any action in regard to Oahe. The Pick-Sloan Plan said that his department was to determine the capacity of the reservoir for irrigation, Sen.

Doc. No. 247, at 1, but the defendants have not presented any evidence that this determination was ever made. Instead, in 1957, Congress was told that a committee comprised of representatives from seven states and seven federal agencies annually determined storage allocations for the upcoming year, and the Corps implemented those recommendations. 1957 Hearings, Part 1, at 131 (testimony of James R. Smith). Furthermore, as I earlier discussed, there is no evidence that a specific block of water was ever assigned solely for irrigation use. The only evidence that the Secretary of the Interior took any action in regard to Oahe is an unsupported assertion that he included capacity for municipal, industrial, and irrigation purposes in the main stem reservoirs. Letter of Solicitor to the Secretary of the Interior, November 27, 1974, Admin. Rec. Doc. No. 900065, at 4. I am not sure what, if anything, the Secretary of the Interior did in regard to reserving Oahe storage, but allocating space or determining reservoir capacity at a reservoir built, operated, and maintained by the Corps does not mean that the Interior Department undertook a reclamation development at Oahe.

The above discussion shows that the Corps, the Bureau, and Congress believed that § 9(c)'s reference to "reclamation and power developments undertaken by the Secretary of the Interior" meant the irrigation dams which the Bureau was to build on the Missouri River's tributaries, while § 9(b) encompassed the dams which the Army was to build, including Oahe.

C.

The text and purposes of §§ 5 through 8 of the Flood Control Act reinforce my belief that the Secretary of the Interior lacked authority to contract with ETSI.

It is clear that the Corps, the Bureau, and Congress believed that the Missouri River's water should not remain idle but should be put to the maximum possible use, including industrial uses, although the propriety of

large industrial uses was not resolved. See 90 Cong. Rec. at 8547-8548. This does not mean that the Interior Department must be able to market unused irrigation water to industrial users. Section 6 of the Flood Control Act authorizes the Secretary of the Army to make contracts for the domestic and industrial use of surplus water available at reservoirs under his control. It does not give similar authority to the Secretary of the Interior, and its legislative history shows that its grant of authority to the Army is exclusive.

Section 6 (§ 4 of the House bill) was enacted because the financial requirements of then-existing law often prevented cities and factories from obtaining water from nearby dams built by the Corps. Section 6 solved this problem by allowing the Army to furnish water for domestic or industrial uses and to set the rates for such use. 90 Cong. Rec. 4126 (statement of Rep. Whittington). Shortly after his explanation, Rep. Whittington addressed § 6 of the House bill, which said that the Interior Department was to prescribe regulations under the reclamation laws for the use of irrigation storage in Corps reservoirs. 90 Cong. Rec. 4127. This provision's reference to the reclamation laws was similar to § 9(c) of the Act as finally adopted, yet nobody suggested that the Interior Department could solve the problem by furnishing unused irrigation water. Instead, Rep. Whittington said that § 6 was needed so that "the Government" could provide water for domestic and industrial use, 90 Cong. Rec. 4197, implying that the Interior Department did not have sufficient authority. Rep. Whittington also said that § 6 would make the authority of the two departments comparable because it would give the Corps the power in reservoir districts, that the Interior Department already had in reclamation districts, 90 Cong. Rec. 4134, which are associated with dams built by the Bureau, not by the Corps. Rep. Whittington's statement does not show, as the defendants claim it does,

that the Interior Department could furnish industrial water from reservoirs controlled by the Corps.

Interior Secretary Ickes' discussion of § 6 (while it still was § 4 of the House bill) shows that he did not believe he could furnish unused irrigation water from Corps reservoirs for industrial use. He knew that the section gave that authority to the Army, but he did not ask Congress to amend the section to include the Interior Department nor did he claim that his department already had such authority; instead, he said that the section "does not involve reclamation but covers merely the sale of water for industrial purposes." 1944 Hearings, at 312. Rep. Curtis and Rep. Whittington also said that the section concerned industrial uses, while irrigation was addressed elsewhere. 90 Cong. Rec. 4133, 4197. These remarks show that industrial uses and irrigation were placed in two separate categories, and there is no indication that the categories ever could be merged. There is no reason to believe that § 6's grant of authority to the Army was not an exclusive one.

Sections 5 and 7 of the Flood Control Act also support the plaintiffs' position. Section 5 says that electricity produced at reservoirs "under the control of the War Department" shall be delivered to the Secretary of the Interior, who then shall sell it.[3] Section 7 authorizes the Secretary of War to prescribe regulations for the use of storage allocated for flood control at all federal reservoirs. These explicit grants of authority show that when Congress wanted to give an agency control over a particular function of the main stem dams, it did so expressly and

---

[3] The federal defendants argue that § 5 does not apply to Oahe. The argument does not show that Congress intended to make a single implicit grant of authority to one agency, in contrast to its many explicit grants. Furthermore, the defendants' position is unreasonable. See 90 Cong. Rec. 9282-9283 (statement of Rep. Whittington); 1957 Hearings, at 323-326 (statements of Sen. Case and Sen. Anderson), 341 (testimony of Edward Weinberg), and 366-371 (memorandum of Interior Department Solicitor).

not by the implicit, indirect method upon which the defendants rely. The absence of an explicit grant of authority is even more important because Congress considered a wide range of proposals for allocating control: one rejected amendment would have given complete control to the Bureau, see 90 Cong. Rec. 8616-8618, 8626, while another would have let the Army control irrigation. *Id.*, at 8458-8550. When debate is so broad in scope and so detailed in nature, it is unlikely that matters were left for implication. I believe that Congress said what it meant and did not intend to leave anything regarding authority to implication.

D.

The defendants argue that I should defer to the Interior Secretary's decision to sign the ETSI contract because it is the decision of an administrative agency and because it is supported by the 1975 Memorandum of Understanding between his department and the Army and by a 1974 memorandum of the Interior Department's solicitor.

The 1975 memorandum does not support the Secretary's decision, but could be read to mean that the Secretary entered it because he believed that he could not act unilaterally. I do not draw that inference, because the Secretary may have entered it for other reasons. Nor shall I defer to the 1974 memorandum, in which the department's solicitor said that the Flood Control Act and the Reclamation Projects Act, when read together, allow the Interior Department to contract with ETSI. Admin. Rec. Doc. No. 900065. The memorandum is just the solicitor's interpretation of several statutes; it does not employ any special technical expertise nor rely on any policy consideration. Therefore, it is entitled to little deference. *Texas Gas Corp. v Shell Oil Co.*, 363 U.S. 263, 270 (1960); *Hi-Craft Clothing Co. v National Labor Relations Board*, 660 F.2d 910, 914 (C.A. 3rd Cir. 1981). The memorandum and the Secretary's decision also at-

tempt to expand the department's jurisdiction, and an agency may not decide the limits of its statutory power. *Social Security Board v Nierotko*, 327 U.S. 358, 369 (1946); *Office of Consumers' Counsel v Federal Energy Regulatory Commission*, 655 F.2d 1132, 1142 (C.A. D.C. Cir. 1980); *Hi-Craft Clothing Co.*, supra, at 916; *Office of Communication of the United Church of Christ v Federal Communications Commission*, 707 F.2d 1413, 1422-1423 (C.A. D.C. Cir. 1983). This is particularly true here, because the Interior Department is asserting control over reservoirs built and operated by the Army, which has disputed the Interior Department's authority to market water unilaterally. See Memorandum of Richard Kearney, Acting General Counsel of the Army, December 16, 1974, Admin. Rec. Doc. No. 900407, at 7, n. 1. When the chief attorneys for the two departments affected by a statute disagree, neither enjoys any deference.

My reluctance to defer to the Secretary of the Interior is strengthened by the fact that the department did not assert such authority while Congress was considering the Flood Control Act but waited until 1974. *Federal Trade Commission v Bunte Brothers, Inc.*, 312 U.S. 349, 351-352 (1941); *Federal Trade Commission v Miller*, 549 F.2d 452, 457 (C.A. 7th Cir. 1977). Additionally, deference is not proper when the agency's decision is neither adequately articulated nor reasonable. *Obremski v Office of Personnel Management*, 699 F.2d 1263, 1269 (C.A. D.C. Cir. 1983). The only expressed basis for the Secretary's decision was the 1974 memorandum of his solicitor, but that memorandum neither mentions the fact that § 9(c) of the Flood Control Act only applies to reclamation developments undertaken by the Interior Department nor explains why Oahe satisfies that requirement.

E.

Two other matters remain. First, the parties attached their exhibits to their briefs instead of filing them with

supporting affidavits. I have not relied on any such exhibits which were not photocopies of congressional material or documents contained in the administrative record.

Second, South Dakota, participating as amicus curiae, argues that the entire issue discussed in this memorandum is irrelevant, because the Army has delegated its authority to the Interior Department. It bases this argument on the fact that the Corps approved ETSI's request for permission to build an intake structure in Lake Oahe, which would be used to remove the water pursuant to the contract. As I understand it, the permit was granted pursuant to 33 U.S.C. § 403, whose purpose is to prevent private parties from building obstructions in navigable waters. *United States v Logan and Craig Charter Service*, 676 F.2d 1216, 1218 (C.A. 8th Cir. 1982). I do not know that the Corps could have rejected the request merely because it believed that the Interior Department could not have authorized the withdrawal of the water which will require the intake structure. Furthermore, the extensive briefs of the defendants do not raise this issue, even though several were submitted after South Dakota's briefs. Given the defendants' ample opportunity in which to present evidence or to argue on this point, I shall not delay my resolution of the pending motions.

The plaintiffs have shown that the Flood Control Act did not authorize the Secretary of the Interior to execute the ETSI contract, and I shall grant their requests for a permanent injunction barring the defendants from performing that contract.

Dated May 3, 1984.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-442

STATE OF MISSOURI, *et al.*,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants.

CV82-L-443

KANSAS CITY SOUTHERN RAILWAY CO., *et al.*,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants.

[Filed May 3, 1984]

JUDGMENT OF PERMANENT INJUNCTION

In accordance with the accompanying memorandum,

IT IS ORDERED:

1. That the motion of ETSI for summary judgment, filing 57 in CV82-L-442, is denied as to Count I of the amended complaint, filing 175;

2. That the motion of ETSI for summary judgment, filing 67 in CV82-L-443, is denied as to Count III of the second amended complaint, filing 168;

3. That the joint motions of the federal defendants and ETSI to dismiss, filings 73 and 97 in CV82-L-442, are denied as to Count I of the amended complaint, filing 175;

4. That the joint motions of the federal defendants and ETSI to dismiss, filings 70 and 104 in CV82-L-443, are denied as to Count III of the second amended complaint, filing 168;

5. That the motion of the States of Missouri, Iowa, and Nebraska for summary judgment, filing 143 in CV 82-L-442, is granted as to Count I of the amended complaint, filing 175;

6. That the motion of the Sierra Club and the Nebraska, Rocky Mountain and Iowa chapters of the Farmers Educational and Cooperative Union of American for summary judgment, filing 147 in CV82-L-443, is granted as to Count III of the second amended complaint, filing 168; and

7. That the defendants are enjoined from performing the "Industrial Water Service Contract Between the United States and ETSI Pipeline Project, a Joint Venture," dated July 6, 1982.

Dated May 3, 1984.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1674/1675/1719/1720/1721NE

THE STATE OF MISSOURI, *et al.*,
Appellees,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Nebraska

[Filed Mar. 13, 1986]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the said District Court is affirmed in accordance with the opinion of this Court.

Costs of Appellees/Cross-appellants, States of Missouri, Iowa, and Nebraska for briefs from Appellants/Cross-appellees: $285.00

March 13, 1986

A true copy:

/ /Robert D. St. Vrain

ATTEST:

Clerk, U.S. Court of Appeals, 8th Circuit.
7/22/86

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1674-NE

THE STATE OF MISSOURI, *et al.*,
Appellees,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellants.

No. 84-1675-NE

THE STATE OF MISSOURI, *et al.*,
Appellees,

vs.

ENERGY TRANSPORTATION SYSTEMS, INC.,
Appellant.

No. 84-1719-NE

THE STATE OF NEBRASKA,
Appellant,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees.

No. 84-1720-NE

THE STATE OF IOWA,
Appellant,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees.

No. 84-1721-NE

THE STATE OF MISSOURI,
Appellant,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees.

Appeals from the United States District Court
for the District of Nebraska

Appellants' petitions for rehearing en banc have been considered by the Court and are denied.

Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions.

Petitions for rehearing by the panel are also denied.

July 10, 1986

Order entered at the Direction of the Court:

/s/ [Illegible]

APPENDIX E

FLOOD CONTROL—CONSTRUCTION

See Congressional Comment, p. 1349

CHAPTER 665—PUBLIC LAW 534

[H. R. 4485]

An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement

for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for con-

struction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the

event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187)[24] and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418),[25] as amended, are hereby amended accordingly.

Sec. 2. That the words "flood control" as used in section 1 of the Act of June 22, 1936,[26] shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

Sec. 3. That section 3 of the Act approved June 22, 1936 (Public, Numbered 738, Seventy-fourth Congress),[27] as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress),[28] shall apply to all works authorized in this Act, except that for any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said

---

[24] 43 U.S.C.A. § 485h.

[25] 16 U.S.C.A. § 590z-1.

[26] 33 U.S.C.A. § 701a.

[27] 33 U.S.C.A. § 701c.

[28] 33 U.S.C.A. § 701c-1.

Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: *Provided*, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

Sec. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided*, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the ~~State~~ in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

Sec. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

Sec. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be depos-

ited in the Treasury of the United States as miscellaneous receipts.

Sec. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided*, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

Sec. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388,[29] and Acts amendatory theerof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation law and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reserviors operated under the direction of the Secretary of War may be utilized hereafter for

---

[29] 43 U.S.C.A. § 372 et seq.

irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

Sec. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938,[30] as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388,[31] and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands,

---

[30] 33 U.S.C.A. § 701b et seq.

[31] 43 U.S.C.A. § 372 et seq.

and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

Supreme Court, U.S.
FILED
FEB 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-939 and 86-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENERGY TRANSPORTATION SYSTEMS, INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB, AND THE IOWA, NEBRASKA AND ROCKY MOUNTAIN CHAPTERS OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA

WILLIAM E. WALTERS, III *
WALTERS & THEIS
2015 York Street
Denver, Colorado 80205
Attorney for the Iowa, Nebraska and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America

RODNEY M. CONFER
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
Of Counsel

STEPHEN E. ROADY *
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700
Attorney for The Kansas City Southern Railway Company

RONALD J. WILSON *
SIERRA CLUB LEGAL DEFENSE FUND
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
Attorney for The Sierra Club

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Flood Control Act of 1944, which explicitly authorizes only the Secretary of the Army to execute contracts for the industrial use of water from main stem Missouri River reservoirs, implicitly authorizes the Secretary of the Interior to enter into a contract for use of the same water without prior approval from the Army.

LIST OF PARTIES

The following parties were plaintiffs in the District Court and appellees in the Eighth Circuit on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944: the States of Missouri, Iowa and Nebraska, The Kansas City Southern Railway Company ("KCSR"), The Sierra Club and the Nebraska, Iowa and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America.

The parties who were defendants in the District Court and appellants in the Eighth Circuit on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944 are listed in the petitions. However, by letter dated January 27, 1987, ETSI, Inc., the only petitioner in No. 86-939, advised the Clerk that it had been dissolved and requested that ETSI Pipeline Project be substituted in its place.

LIST OF PARENT COMPANIES AND AFFILIATES

The KCSR is a wholly-owned subsidiary of Kansas City Southern Industries, Inc. KCSR is affiliated with the Louisiana and Arkansas Railway Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
LIST OF PARENT COMPANIES AND AFFILIATES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	7
REASONS TO DENY THE PETITIONS	7
I. The Decision Below Is Limited Both In Scope And Effect Because The ETSI Project Has Been Terminated And Because That Project Was The Only Element Of Interior's Unilateral Water Marketing Program	7
II. The Decision Below Leaves Existing Procedures For Industrial Access To Main Stem Missouri River Water Undisturbed	8
A. The Army Secretary Remains Authorized To Enter Into Industrial Water Marketing Contracts At Main Stem Missouri River Reservoirs	8
B. Previous Contracts Entered Into By The Interior Secretary With Prior Army Approval Are Unaffected By The Decision	10

TABLE OF CONTENTS—Continued

Page

III. The Decision Below Is Correct On The Merits And Is Reasonable As A Matter Of Public Policy 11

A. The Decision Is Fully Supported By The Plain Language And Legislative History Of The 1944 Flood Control Act, Which Denies The Interior Secretary Authority To Enter Into The ETSI Contract 11

B. The Decision Properly Declines To Defer To The Interior Secretary's Interpretation Of The 1944 Flood Control Act Because That Interpretation Conflicts With The Act's Plain Language And Legislative History As Well As With A Contrary Interpretation By The Army 13

C. The Decision Furthers The Public Interest By Confirming The Procedures That Protect Existing Users Of Missouri River Water 15

CONCLUSION 16

TABLE OF AUTHORITIES

CASES Page

Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985) 15
Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13, 14
Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245 (1986) 14
Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524 (1985) 14
Federal Deposit Ins. Corp. v. Philadelphia Gear Corp., 106 S.Ct. 1931 (1986) 14
International Paper Company v. Ouellette, 55 U.S.L.W. 4138 (U.S. January 21, 1987) 11
Ratchford v. Gay Lib, 434 U.S. 1080 (1978) 15
Tiverton Bd. of License Comm'rs v. Pastore, 469 U.S. 238 (1985) 10
TVA v. Hill, 437 U.S. 153 (1978) 12
United States v. City of Fulton, 106 S.Ct. 1422 (1986) 14, 15
United States v. Clark, 454 U.S. 555 (1982) 12
United States v. Riverside Bayview Homes, Inc., 106 S.Ct. 455 (1986) 14
Young v. Community Nutrition Inst., 106 S.Ct. 2360 (1986) 14

STATUTES AND REGULATIONS

Flood Control Act of 1944

Section 1, 58 Stat. 887 2
Section 5, 58 Stat. 887 15
Section 6, 58 Stat. 890 ..... *passim*
Section 8, 58 Stat. 891 ..... *passim*
Section 9, 58 Stat. 891 ..... *passim*
Section 9(c), 58 Stat. 891 ..... 5, 16

Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 319 (codified as amended at 43 U.S.C. § 390(b)(2) (1982)) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Corps of Engineers Project Planning Guidance, Regulation ER 1105-2-20, section 7.3(b) (Jan. 29, 1982) 5, 10

CONGRESSIONAL MATERIALS

132 Cong. Rec. H11511 (October 17, 1986) 10
132 Cong. Rec. S2440 (March 11, 1986) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-939 and 86-941

ENERGY TRANSPORTATION SYSTEMS, INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB, AND THE IOWA, NEBRASKA AND ROCKY MOUNTAIN CHAPTERS OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA

Respondents The Kansas City Southern Railway Company ("KCSR"), The Sierra Club, and the Iowa, Nebraska and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America (hereinafter collectively "private party respondents") respectfully request this Court to deny the petitions for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the District Court is reported at 787 F.2d 270. The District Court opinion is reported at 586 F.Supp. 1268.

STATUTES INVOLVED

Sections 1 and 9 of the 1944 Flood Control Act are set out by the petitioners. The correctness of the decision below is made obvious by the language of Sections 6 and 8 of that Act as well. Those sections are set out here:

> Sec. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department; *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.
>
> Sec. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent

specific authorization of the Congress by an authorization Act; and within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the costs of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dām or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

STATEMENT OF THE CASE

This case arises from an attempt by the Department of the Interior to usurp authority over the main stem of the Missouri River which was granted to the Department of the Army in the Flood Control Act of 1944. That Act responded to the twin concerns of protecting the lower Missouri River Basin from flooding along the River's main stem, while allowing irrigation uses of water in the upper Missouri Basin. The Act resolved conflicts between the Department of the Army's Corps of Engineers and the Department of the Interior's Bureau of Reclamation.

Specifically, the Act granted to the Army Secretary authority to develop, operate and maintain each reservoir to be built on the main stem of the Missouri. In Section 6 of the Act, the Congress stated that this authority included the authority to market water from the main stem reservoirs for industrial use. (Pet. App. 81a-82a.) At the same time, the Act granted to the Secretary of the Interior authority to develop, operate and maintain a number of reservoirs to be built on various tributaries to

the Missouri. In Section 9 of the Act, the Congress made federal reclamation law applicable to those reservoirs constructed by Interior. (Pet. App. 83a.)

Significantly, in crafting this compromise, the Congress on two occasions rejected language that would have provided authority for Interior to market water for industrial use from the main stem reservoirs developed and operated by the Army. At one stage, the Congress refused to adopt an amendment to Section 6 proffered by the Interior Secretary, rejecting his effort to claim industrial marketing authority at main stem reservoirs. (See Pet. App. 28a-29a.) At another, Congress struck language from Section 8 which would have granted the Interior Secretary some authority to manage water stored in main stem reservoirs. (See Pet. App. 25a-28a). Instead, Congress substituted the current language, which explicitly limits the power of the Interior Secretary over water at those reservoirs to the management of only that water which is to be used in connection with irrigation works. (Pet. App. at 82a-83a.)

The two agencies operated consistent with this clear division of authority between the Army Department and the Interior Department for over thirty years, during which time Interior never sought to exercise the authority it now claims, nor developed regulations which would have implemented any such authority. In 1957, for example, the Interior Department advised the Congress that it did not consider the main stem reservoirs of the Missouri to be "reclamation developments," and therefore was not depositing hydroelectric revenues derived from the operation of main stem reservoirs into its reclamation fund. (See Pet. App. 20a-21a.)

In 1958, the Congress provided the Army Secretary with another statutory vehicle for marketing water for industrial use when it enacted the Water Supply Act, 43 U.S.C. § 390b. Under the 1958 Act, the Army Secre-

tary can market water for industrial use so long as that process does not significantly affect project purposes. Under regulations promulgated by the Army pursuant to that Act, the Army Secretary may market up to 50,000 acre feet of water annually.[1]

During the energy crisis of the 1970's, Interior renewed its previously unsuccessful effort to obtain authority to market water for industrial use from Army reservoirs. Relying upon an internal, unpublished memorandum from its Solicitor in 1974 which baldly asserted the existence of that authority, Interior pressed Army to enter into a Memorandum of Understanding ("MOU") as part of a plan to divert main stem Missouri water for energy use.

The Army expressed grave reservations concerning Interior's claim of authority to engage in such marketing. In 1974, the Acting General Counsel of the Army disputed the Interior Solicitor's conclusion and advised the Army's Chief of Civil Functions that Interior lacked the authority to engage unilaterally in industrial water marketing from main stem reservoirs on the River. (See Pet. App. 10a-11a.)

After further negotiations between the two agencies, the MOU was signed in 1975. The MOU provided that Interior would act as agent for the Army and assume authority to market water for energy use from main stem reservoirs so long as each contract had prior Army approval. Shortly after signing the MOU, the Army Secretary wrote the Interior Secretary urging that they both seek clarification from the Congress over the authority question. After several extensions, the MOU lapsed in 1978. It has not been revived.

Notwithstanding the expiration of the MOU, on July 2, 1982 the Secretary of the Interior, claiming unilateral authority under Section 9(c) of the 1944 Flood Control Act, executed a water service contract with ETSI Pipe-

---

[1] Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, Section 7.3(b) (January 29, 1982).

line Project ("ETSI") without obtaining the approval of the Army Secretary. The contract would have allowed ETSI to take 20,000 acre feet of water per year from the Oahe Reservoir for use as a transportation medium for crushed coal in a proposed pipeline extending from the Powder River Basin in Wyoming to power plants in the mid-South. The private party respondents, along with the States of Missouri, Iowa and Nebraska (hereinafter "State respondents") then brought the instant proceedings challenging the contract on several grounds in federal court.

On May 3, 1984, Chief Judge Warren K. Urbom of the United States District Court for the District of Nebraska ruled in favor of one argument advanced by both the private party and State respondents, concluding that the 1944 Flood Control Act did not provide the Interior Secretary authority to approve the ETSI contract. Accordingly, Judge Urbom entered summary judgment against the petitioners, permanently enjoining contract performance. ETSI, Inc. and the Interior Secretary appealed Judge Urbom's decision.[2]

On July 31, 1984, ETSI announced that it had terminated its project. The respondents then suggested that the appeals should be dismissed as moot or unripe. After remanding the proceedings to the District Court for an initial mootness determination, a split panel of the Eighth Circuit ruled that the case was not moot.

The Eighth Circuit issued its 2-1 decision on March 31, 1986 affirming Judge Urbom on the merits of the appeal. The Court of Appeals concluded that the purpose, plain language and legislative history of the 1944 Flood Control Act failed to provide authority for the Interior Sec-

---

[2] After initially dismissing the private party respondents for lack of standing to challenge the Interior Secretary's authority, Judge Urbom vacated that decision and allowed them to participate in the appeals. The Eighth Circuit did not reach the issue of standing with respect to the private party respondents in its opinion below, and that issue is not raised here by the petitioners.

retary to enter unilaterally into the ETSI contract. An evenly divided Eighth Circuit denied rehearing on July 10, 1986.

SUMMARY OF THE ARGUMENT

This case does not merit review by the Court. It is correctly decided, and it has limited effect.

This case concerns the only contract ever signed by the Secretary of the Interior in his Department's effort to market water for industrial use from a main stem Missouri River reservoir absent prior Army approval. The project which required the contract has been terminated. The decision below closely follows the language of the 1944 Flood Control Act in enjoining the contract, and leaves available the Army procedures Congress clearly delineated in the 1944 Act for access to main stem Missouri River waters for industrial use.

The decision relies as well upon the legislative history of the 1944 Flood Control Act, which includes two flat rejections of amendments that would have granted the Interior Secretary authority like that he now claims. Given the clear assignment of industrial water marketing responsibility to the Army spelled out in the 1944 Act, the Court of Appeals properly refused to defer to Interior's assertion of implied competing authority. In so doing, the Court below remained faithful to the purpose of the Congress when it allocated the authority for Missouri River Basin projects between Army and Interior.

REASONS TO DENY THE PETITIONS

I. The Decision Below Is Limited Both In Scope And Effect Because The ETSI Project Has Been Terminated And Because That Project Was The Only Element Of Interior's Unilateral Water Marketing Program.

There are no broad questions of law presented by this case. To the contrary, given the current state of the facts, the decision below has a decidedly limited effect.

First, the ETSI contract enjoined in this action was the only contract ever entered into by the Secretary of the Interior under his plan to market water for industrial use from main stem Missouri River reservoirs without prior Army approval or authorization.[3] Apparently Interior's program is now dormant. Therefore, any ruling in this case would have no effect on any existing efforts by the Interior Secretary to implement that program.

Second, ETSI announced the termination of its project in July of 1984 and has not revived the project. Moreover, on July 31, 1984, ETSI terminated its agreement with the South Dakota Conservancy District for assignment of a water right from Oahe Reservoir and has not renewed that agreement. Indeed, ETSI, Inc., which was the corporate entity named to represent ETSI as a party below, has been dissolved.[4] Thus there is a real question whether this case presents any live controversy as to ETSI.

For these reasons, the decision raises no issue worthy of review by this Court.

II. The Decision Below Leaves Industrial Access To Main Stem Missouri River Water Undisturbed.

A. The Army Secretary Remains Authorized To Enter Into Industrial Water Marketing Contracts At Main Stem Missouri River Reservoirs.

The petitioners and *amici* argue that the decision below forecloses industrial access to water in main stem Mis-

---

[3] The petitioners refer to three contracts for the industrial use of water from Missouri River main stem reservoirs which they claim could be affected by the decision below. However, each of these contracts was entered into following the procedures adopted in the MOU. Thus, the Eighth Circuit correctly found that the ETSI contract is the only example of Interior's assertion of authority under the 1944 Act without prior approval by the Army. (See Pet. App. 11a.)

[4] ETSI, Inc. advised the Clerk of this Court that it had been dissolved by letter dated January 27, 1987.

souri River reservoirs. This argument largely ignores the Secretary of the Army's ability to market industrial water from those very reservoirs.

The government attempts to minimize the fact that access to industrial water on the Missouri is available through the Army by focusing solely on the Interior Secretary while conceding in a footnote that its petition raises no issue concerning Army's authority. Hodel Pet. at 12 n.13. ETSI briefly describes Army's authority, but suggests that it is insufficient despite the fact that the Army enjoys power to make available water in the amounts the ETSI project required. ETSI Pet. at 20 n.28.

In any event, the decision below leaves in place the Army's historical statutory ability to market water for industrial use either under Section 6 of the 1944 Flood Control Act, 58 Stat. 890 (codified at 33 U.S.C. § 708), or under the 1958 Water Supply Act, 43 U.S.C. § 390b (b). Under that Army authority, if the ETSI project were still alive, there would be nothing to prevent it from applying, or from fostering an application, to the Army for the water service it requires.

In fact, after entry of the ruling below by the District Court, the State of South Dakota filed precisely such an application on ETSI's behalf with the Army Corps of Engineers, invoking the 1958 Act. The Corps immediately began processing that application, and halted the process only upon termination of the ETSI project. The fact that the petitioners availed themselves of existing Army procedures competely belies their suggestion here that the decision below "locks up" the water in Oahe reservoir and prevents industrial use.[6]

---

[6] The petitioners' additional suggestion that marketing water for industrial use by Army rather than by Interior would adversely affect the government's ability to recoup costs is likewise incorrect. Both Section 6 of the 1944 Flood Control Act, and the 1958 Water

B. Previous Contracts Entered Into By The Interior Secretary With Prior Army Approval Are Unaffected By The Decision.

Given the admitted existence of Army authority which provides adequate procedures for industrial use of main stem Missouri River water,[6] the Secretary of the Interior can only argue that the decision below should be reviewed merely because he has entered into other "similar" contracts, and "may wish to execute other such contracts in the future." Hodel Pet. at 13. As noted earlier, however, the Court of Appeals correctly determined that the ETSI contract is the *only* contract for industrial water use from Army reservoirs on the Missouri River ever entered into unilaterally by the Interior Secretary. (See Pet. App. 11a.) Accordingly, the decision below has no effect on other contracts.

Additionally, to the extent the Interior Secretary believes that his Department should be involved in industrial water service contracts at main stem Missouri River

---

Supply Act, contemplate that the Army will require payment for industrial water use. In fact, in Section 932 of the Water Resources Development Act of 1986, the Congress recently reaffirmed its intention that Army recoup costs for industrial water use. 132 Cong. Rec. H11511 (October 17, 1986); *see* 132 Cong. Rec. S2440 (March 11, 1986).

[6] Existing Army regulations under the 1958 Water Supply Act allow up to 50,000 acre feet of water to be marketed from Army reservoirs annually for industrial use. Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, Section 7.3(b) (January 29, 1982). Respondents understand that changes in policy under Section 6 of the 1944 Act that would allow industrial marketing in even greater volumes are currently under review by the Army. The private party respondents note this recent development, as well as the Congressional action identified in the previous footnote, in order that the Court be fully apprised of matters that may affect the petitions. *See, Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985).

reservoirs, he remains free under the decision below to explore some new understanding with the Army Secretary, or to return to the Congress to seek the authority which Congress refused him in 1944. In any event, the fact that the Interior Secretary may wish at some future time to enter into other industrial water service contracts with entities who are not parties here surely provides no basis for this Court to review this case. *See, International Paper Co. v. Ouellette*, 55 U.S.L.W. 4138, 4146 (U.S. January 21, 1987) (Stevens and Blackmun, J.J., concurring in part and dissenting in part) (Court does not sit to draft advisory opinions for possible future guidance of other courts).

III. The Decision Below Is Correct On The Merits And Is Reasonable As A Matter Of Public Policy.

A. The Decision Is Fully Supported By The Plain Language And Legislative History Of The 1944 Flood Control Act, Which Denies The Interior Secretary Authority To Enter Into The ETSI Contract.

The Court of Appeals decision is clearly correct on the merits. It is fully supported not only by the plain language of the 1944 Flood Control Act, which sets out the allocation of authority in the Missouri River Basin between the Interior Secretary and the Army Secretary, but also by the legislative history of that Act.

Sections 6, 8 and 9 of the 1944 Act dictate that Army rather than Interior enjoys the authority to market water for industrial use from main stem Missouri River reservoirs. In brief, Section 6 provides that the Army Secretary shall have authority over all industrial water uses at reservoirs he controls. (Pet. App. 81a.) With respect to such Army-controlled reservoirs, Section 8 provides the Interior Secretary with authority over only such water and water works as are used in irrigation. (Pet. App. 82a-83a.) Finally, Section 9(c) triggers the

Interior Secretary's power under the reclamation laws only with respect to those projects which have been undertaken by him. Those projects do not include Oahe.[7] (Pet. App. 83a-84a.)

Therefore, because ETSI sought water for industrial use (not for irrigation), and because Oahe was built and is operated by the Army, the plain language of the 1944 Act simply does not grant the Interior Secretary authority to enter into the ETSI contract. Instead, the language of the Act directs those seeking Oahe water for industrial purposes to make their agreements with the Army. (See Pet. App. 18a-21a.)

Since the plain language of the statute dictates only one conclusion, that language governs. *United States v. Clark*, 454 U.S. 555, 560 (1982); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978). Accordingly, the decision below was entirely correct, and it does not merit review.

Moreover, even if the language of the 1944 Flood Control Act were not so conclusive, the legislative history of the Act demonstrates without question that the Interior Secretary does not possess the authority he seeks. Specifically, during the deliberations attending passage of the 1944 Act, when confronted with then-Secretary Ickes' argument that Interior should be granted authority to enter into industrial water service contracts at reservoirs such as Oahe, Congress refused to accept his proposed amendment. (See Pet. App. 28a-29a). In addition, during those same 1944 deliberations, Congress deleted language proposed for Section 8 which would have granted the Interior Secretary broad authority to regulate water stored in Oahe. Instead, Congress substituted the current language of Section 8, which limits Interior's authority

---

[7] The petitioners do not dispute that the Oahe Reservoir was constructed and is operated by the Army Department, rather than by the Interior Department.

over main stem reservoirs to regulation of water used in irrigation. (See Pet. App. 24a-28a.)

These actions by the 1944 Congress—actions that go unmentioned by the petitioners despite being central to the decision below—demonstrate that Congress considered and denied the very authority which the Interior Secretary now seeks.

B. The Decision Properly Declines To Defer To An Interpretation Of The 1944 Flood Control Act By The Interior Secretary Because That Interpretation Conflicts With The Act's Plain Language And Legislative History As Well As With A Contrary Interpretation By The Army.

The Interior Secretary and ETSI argue finally that the decision below should be reviewed for the reason that it undermines the concept of deference to agency interpretations of their empowering statutes articulated in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Hodel Pet. at 16; ETSI Pet. at 24-25. However, the decision below is fully consonant with *Chevron* and its progeny. It formulates no new deference principles, and it correctly applies existing law.

Contrary to the suggestion by ETSI, the decision below does not attempt to carve out a "jurisdictional issue" exception to deference. Instead, the Court of Appeals expressly relied upon *Chevron* to inform its analysis. (See Pet. App. 32a-33a.) As the court below correctly observed, *Chevron* and its progeny counsel deference when two conditions obtain: first, the agency offering the construction must enjoy the power to administer the provision it construes; second, the construction must be reasonable. Neither of these circumstances is found here.

As discussed earlier, Section 6 of the 1944 Flood Control Act clearly authorized the Army Department to market water for industrial use from main stem Missouri River reservoirs, and the 1944 Congress rejected

language which would have granted similar authority to the Interior Department. Thus, the 1944 Act simply does not empower Interior to market water for industrial use from Oahe Reservoir. Moreover, the internal memorandum by Interior's Solicitor prepared thirty years after the fact in 1974, and to which the petitioners insist deference is due, unreasonably ignored both the language of Section 6 and the legislative history of the 1944 Act. In addition, the Acting General Counsel of the Army expressly disagreed with the Solicitor's conclusion in a contemporaneous analysis prepared during 1974. Accordingly, this case simply presents no basis for deference under the reasoning of *Chevron*.

Each of the other cases relied upon by the petitioners is distinguishable on the same ground. Unlike this case, in each of the petitioners' cases the statute under review unequivocally empowered the agency offering the interpretation to administer the provision in question.[8]

For example, in the case cited prominently by ETSI, *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986), this Court deferred to an interpretation by the CFTC of its own enabling statute (the Com-

---

[8] *See, Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3250 (1986) (review of CFTC interpretation of its own enabling act); *Young v. Community Nutrition Inst.*, 106 S.Ct. 2360, 2362, 2366 (1986) (review of interpretation by FDA of act which expressly vested interpretive power in FDA); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 106 S.Ct. 1931, 1935, 1938-39 (1986) (review of FDIC interpretation of its enabling laws); *United States v. City of Fulton*, 106 S.Ct. 1422, 1426 and n.3, 1427-28 (1986) (review of Energy Secretary's interpretation of provision which unquestionably vested power in him); *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 457 and n.1 (1986) (review of Corps of Engineers interpretation of Clean Water Act provision which expressly empowered Corps to control permits affecting wetlands); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530-31 n.16 (1985) (review of interpretation by HHS Secretary of Medicaid provision under act which expressly provided interpretive authority to the Secretary);

modities Exchange Act) only after noting that the interpretation was a "longheld position" which was "well within the scope of its delegated authority." *Id.* at 3254. Similarly, in the one case relied upon by the Interior Secretary, *United States v. City of Fulton*, 106 S.Ct. 1422 (1986), this Court deferred to an interpretation of Section 5 of the 1944 Flood Control Act by the Secretary of Energy after emphasizing that there was no question concerning the existence of his authority to administer the section under review. *Id.* at 1426-1427. In this case, the existence of authority is precisely the question presented. For this reason, the Court of Appeals properly declined to defer to the Interior Secretary's unreasonable construction of the 1944 Flood Control Act.[9]

C. The Decision Furthers The Public Interest By Confirming The Procedures That Protect Existing Users Of Missouri River Water.

The decision below should remain undisturbed for an additional reason. Unlike the result which would obtain if the petitioners were to prevail, the decision below protects the rational division of authority between the Interior Department and the Army Department established by the 1944 Congress. Under the decision, those seeking water for industrial purposes from main stem Missouri River reservoirs can simply apply to the Army

---

Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 118 n.2 (1985) (review of EPA interpretation of provision of Clean Water Act which expressly directed EPA to administer its terms).

[9] In a final attempt to persuade this Court of the need to review this case, the petitioners emphasize the even division of the Court of Appeals in denying rehearing. This argument of course overlooks the fact that there was no division whatever between the conclusions of both lower courts; the Court of Appeals affirmed the district court's conclusion on the merits. In any event, a closely-divided denial of rehearing does not provide a sufficient basis for certiorari. *See, Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (certiorari denied when court of appeals evenly split in denying rehearing).

under Section 6 of the 1944 Act (or under the 1958 Water Supply Act) rather than applying to the Secretary of the Interior under Section 9(c). Unlike the provisions of the reclamation laws which are triggered by Section 9(c), Section 6 requires the Army to consider the effect of the application upon existing users of water. The 1958 Act likewise protects against any significant changes in the operations or purposes of the affected reservoir as a result of industrial water diversions.

Thus, unlike Section 9(c), both the 1958 Act and Section 6 contain protections against excessive water depletion from main stem reservoirs of the Missouri. Allowing Interior to compete with Army for the marketing of water for industry from these reservoirs would upset the existing allocations of responsibilities which allow for smooth functioning of the two agencies in protecting all those who now depend upon the waters of the Missouri. For this reason, the decision below is not only correct, it is in the public interest.

CONCLUSION

For each of the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM E. WALTERS, III *
WALTERS & THEIS
2015 York Street
Denver, Colorado 80205
Attorney for the Iowa, Nebraska and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America

RODNEY M. CONFER
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
Of Counsel

STEPHEN E. ROADY *
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700
Attorney for The Kansas City Southern Railway Company

RONALD J. WILSON *
SIERRA CLUB LEGAL DEFENSE FUND
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
Attorney for The Sierra Club

* Counsel of Record

Supreme Court, U.S.
FILED
FEB 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-939 and 86-941

In The

Supreme Court of the United States

October Term, 1986

ENERGY TRANSPORTATION SYSTEMS, INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS, THE STATES OF MISSOURI, IOWA AND NEBRASKA, IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATE OF MISSOURI

WILLIAM L. WEBSTER
Attorney General

CURTIS F. THOMPSON*
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Tel. (314) 751-3321

STATE OF IOWA

THOMAS J. MILLER
Attorney General

ELIZABETH M. OSENBAUGH*
Deputy Attorney General

ELIZA OVROM
Assistant Attorney General
Hoover State Office Bldg.
Des Moines, IA 50319
Tel. (515) 281-5351

STATE OF NEBRASKA

ROBERT M. SPIRE
Attorney General

LE ROY W. SIEVERS*
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
Tel. (402) 471-2682

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

1. Whether the Flood Control Act of 1944, which explicitly authorizes only the Secretary of the Army to execute contracts for the industrial use of water from Army reservoirs on the main stem of the Missouri River, implicitly grants authority to the Secretary of the Interior to enter into a contract for such water use.

PARTIES TO THE PROCEEDING

The following parties were plaintiffs in two consolidated actions in the District Court and appellees in the Eighth Circuit: the States of Missouri, Iowa and Nebraska. The Kansas City Southern Railway Company, The Sierra Club, and the Nebraska, Iowa and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America.

The parties who were defendants in the District Court are listed in the petitions. Counsel for petitioner Energy Transportation Systems, Inc., a defendant below, advised the Clerk of this Court on January 27, 1987, that that corporation has been dissolved. That letter requests that ETSI Pipeline Project, which was not a party below, be substituted as petitioner.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Statutes Involved	2
Statement of the Case	2
Summary of Argument	5
Reasons for Denying the Petitions	6
1. The ETSI Contract Is the Only Existing Contract Based on the Secretary of the Interior's Assertion of Independent Authority, and the ETSI Project Has Been Cancelled	6
2. The Decision Below Concerns Only Industrial Use of Water in Army Reservoirs on the Missouri River. It Does Not Affect Irrigation Use and Has Only Limited Effect on the Department of the Interior	7
3. The Ruling Does Not Prevent Use of These Waters Under Army Control	7
4. The Department of the Interior's Disagreement With the Wisdom of the 1944 Act Should be Presented to Congress Rather Than to This Court	8
5. The Ruling Below Properly Applies Established Principles of Deference to the Facts of This Case	9
A. Interior's Claim of Authority Is Based Entirely on A Poorly Reasoned Legal Memorandum Which Is Directly Contrary to the Opinion of Army's Chief Attorney	9
B. There Is No Long-Standing Interpretation to Which the Courts Should Defer	10

TABLE OF CONTENTS—Continued

Page

C. Petitioners Rely on Legislative History Which Reflects A Proposal Which Was Not Enacted 11

D. The Decision Below Does Not Conflict With Precedents of This Court 12

6. This Case Does Not Present a Conflict Over State Water Rights 13

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES

Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 106 S.Ct. 681 (1986) 12

Bowen v. American Hospital Association, 106 S.Ct. 2101 (1986) 12

Commodity Futures Trading Comm'n v. Schor, 106 S.Ct. 3245 (1986) 12

Fusari v. Steinberg, 419 U.S. 379 (1975) 8

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 12

United States v. Dion, 106 S.Ct. 2216 (1986) 12

STATUTES

Flood Control Act of 1944, ch. 665, 58 Stat. 887, *et seq.* ..... *passim*

Section 6, 33 U.S.C § 708 ..... *passim*

Section 8, 43 U.S.C. § 390 ..... 11, 13

Section 9 ..... 2, 3

Section 9(c) 3, 4, 6, 9

Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll* 9

Water Supply Act of 1958, 43 U.S.C. § 390b(b) 8

28 U.S.C. § 1254(1) 6

42 U.S.C. § 7152(a)(1)(E) 10

CONGRESSIONAL MATERIALS:

Flood Control: Hearings on H.R. 4485 Before a Subcommittee of the Committee on Commerce, 78th Cong., 2d Sess. 312 (1944) 11

Nos. 86-939 and 86-941

In The

Supreme Court of the United States

October Term, 1986

ENERGY TRANSPORTATION SYSTEMS, INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS, THE STATES OF MISSOURI, IOWA AND NEBRASKA, IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-44a) is reported at 787 F.2d 270. The opinion of the Chief Judge of the United States District Court for the District of Nebraska, the Honorable Warren K. Urbom (Pet. App. 45a-72a), is reported at 586 F.Supp. 1268.

STATUTES INVOLVED

Section 6 of the Flood Control Act of 1944, ch. 665, 58 Stat. 890, codified as 33 U.S.C. § 708, provides as follows:

> The Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

Section 9 of the Flood Control Act of 1944, ch. 665, 58 Stat. 891, is printed in petitioners' briefs.

Sections 1 through 9 of the Flood Control Act of 1944 are also printed as Pet. App. 76a-84a.

STATEMENT

The Department of the Interior executed a water service contract with ETSI Pipeline Project (ETSI) in July 1982, purporting to authorize withdrawal of water from Lake Oahe, a Missouri River reservoir. Oahe was built and is operated by the U.S. Army Corps of Engineers. ETSI planned to use the water to transport pulverized coal to the southern United States. In May 1984, the District Court for the District of Nebraska held that the

Secretary of the Interior lacked statutory authority to execute the ETSI contract. The Court of Appeals for the Eighth Circuit affirmed the District Court.

ETSI has indefinitely postponed construction of the pipeline based on considerations unrelated to this litigation.

The authority to market water for industrial use at Army reservoirs is expressly delegated to the Secretary of the Army in section 6 of the Flood Control Act of 1944. That section states in key part:

> That the Secretary of War [now Army] is authorized to make contracts . . . at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. . . .

Despite this clear language, the Department of the Interior claimed that its industrial marketing authority under reclamation law applied to Army reservoirs on the Missouri River by incorporation through section 9(c) of the Act. Section 9(c) provides that ". . . the reclamation and power developments to be undertaken by the Secretary of the Interior under [the plans approved in section 9(a)] shall be governed by the Federal Reclamation Laws. . . ." The Court of Appeals and the District Court held that Army, rather than Interior, had industrial water marketing authority at Army reservoirs under the 1944 Flood Control Act.

Lake Oahe is clearly not a reclamation development undertaken by the Secretary of the Interior. Oahe is one

of six Missouri River main-stem reservoirs constructed, operated, and maintained by the Army Corps of Engineers. Because the dominant function of these reservoirs are flood control and navigation. Congress placed them under Army's jurisdiction. (Pet. App. 21a, 47a-48a). Interior's Bureau of Reclamation was granted authority over the many tributary dams built primarily for irrigation use.

In 1975, during the "energy crisis," Interior and Army signed a memorandum of understanding (MOU) to market Missouri River water for energy use. (Pet. App. 10a-11a) (Court of Appeals Joint Appendix 181, hereafter Ct. App. J.A.). The MOU permitted Interior to execute contracts but required Army approval of each one. (Army's Acting General Counsel had concluded that Interior could not independently market the water. (Pet. App. 11a, 34a)). Army refused to extend the MOU in 1978, citing reservations concerning its legality. (Ct. App. J.A. 189).

Army did not approve the ETSI contract. The Department of the Interior executed it solely on the purported authority of section 9(c) of the Flood Control Act of 1944. (Pet. App. 15a-17a).

ETSI's petition couches the issues according to versions of the facts with which we disagree. Although this brief does not attempt to rebut all such characterizations, we believe it would be improvident to grant certiorari based upon the factual contentions in that petition.

———o———

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is clearly correct. Petitioners simply disagree with its resolution of a narrow question—whether the Flood Control Act of 1944, which explicitly authorizes only the Secretary of the Army to execute contracts for the industrial use of water from Army reservoirs on the Missouri River, implicitly grants authority to the Secretary of the Interior to enter into a contract for such water use.

No need exists for this Court to settle that question. Only one contract has been executed under this claimed authority. Performance of that contract was suspended after ETSI announced in 1984 that it had terminated its coal slurry pipeline project.

The ruling below does not affect the Secretary of the Interior's authority over irrigation use. It also does not affect the Secretary of the Army's authority to provide for industrial or other use of water in the reservoirs.

The courts below properly refused to defer to Interior's assertion of authority. That assertion wholly relied on a poorly reasoned Interior Solicitor's memorandum. That opinion is contrary to the opinion of Army's chief attorney and the contemporaneous interpretation of the Secretary of the Interior in 1944.

The Court of Appeals properly rejected South Dakota's argument that the issue of Army versus Interior authority affects that State's right to allocate water. South Dakota's proposal to consolidate an original action with certiorari review in this case is inappropriate and untimely.

REASONS FOR DENYING THE PETITION

1. The ETSI Contract Is the Only Existing Contract Based on the Secretary of the Interior's Assertion of Independent Authority, and the ETSI Project Has Been Cancelled.

The ETSI contract is the only existing contract based solely on the purported authority of the Department of the Interior under section 9(c) of the 1944 Act.[1] (Pet. App. 11a). It is therefore the only contract which could be affected by the decision below. Review of that decision is not likely to have any practical effect on the ETSI contract because ETSI announced on July 31, 1984, that it had terminated its coal slurry pipeline project.[2] (Hodel pet., p. 10, n.11). ETSI no longer has a state water permit. (Mootness Ex. 10). Performance of the ETSI water service contract had already been suspended for other reasons prior to the Court of Appeals decision. (Mootness Ex. 10).

---

[1]The two industrial water service contracts executed under the 1975 Memorandum of Understanding (MOU) (Ct. App. J.A. 191, 192) also rely on Army's authority. (See Pet. App. 10a-11a). The decision below will not affect those contracts. A "master contract" with the State of Montana was also executed under the MOU. That agreement, which established a procedure for approving contracts within that State, expired in 1986. No contracts with users were executed under it.

[2]Counsel for Petitioner Energy Transportation Systems, Inc., in a letter to the Clerk dated January 27, 1987, states that the corporation, which was a party below, has been dissolved and requests that ETSI Pipeline Project be substituted for it. Normally only a party can file a petition for certiorari. 28 U.S.C. § 1254(1). As Energy Transportation Systems, Inc. no longer exists, this is another reason to deny the petition.

2. The Decision Below Concerns Only Industrial Use of Water in Army Reservoirs on the Missouri River. It Does Not Affect Irrigation Use and Has Only Limited Effect on the Department of the Interior.

No need exists for this Court to review the comprehensive decision below. The Court of Appeals did not preclude the proper federal agency from marketing Oahe water for industrial use. It decided only that the Secretary of the *Interior* could not do so from this Army reservoir.

The decision is limited to Interior's claim of authority over industrial use of waters at the six Army reservoirs on the Missouri River. It does not affect Interior's authority to use that water for irrigation purposes nor does it affect Interior authority over the many reservoirs under its control in the Missouri River Basin or elsewhere.[3]

3. The Ruling Does Not Prevent Use of These Waters Under Army Control.

The decision below will not cause irrigation water to sit idle. There is no "unutilized" irrigation storage at Oahe. Water there is in multiple-use storage, where it is used for other authorized purposes including navigation and hydropower generation. (Pet. App. 22a-23a, n.15). Army has always managed this multiple-use storage, and the Solicitor General concedes that this case does not raise any question concerning Army authority to manage these waters. (Hodel pet., p. 12, n.13).

---

[3]The decision below does not prevent the recovery of federal costs. Army's enabling acts provide for repayment by industrial users. Waters stored at Oahe are currently used for hydropower generation, which also provides revenues.

Further, the Secretary of the Army has industrial marketing authority under both section 6 of the 1944 Act and the Water Supply Act of 1958, 43 U.S.C. § 390b(b). Indeed, after the District Court decision, South Dakota, on ETSI's behalf, sought a Corps contract under the Water Supply Act.[4] (Mootness Ex. C). That application was pending when ETSI announced termination of this project. (Mootness Ex. D). Additionally the Corps is currently considering broadening its definition of "surplus water" under section 6 of the 1944 Act to make more water available for industrial marketing.[5]

4. The Department of the Interior's Disagreement With the Wisdom of the 1944 Act Should be Presented to Congress Rather Than to This Court.

In reality the Department of the Interior and the *amici curiae* do not like section 6 of the 1944 Flood Control Act, which allows Army to control industrial marketing at Army reservoirs and contains protections for exist-

---

[4]The Water Supply Act permits marketing which does not substantially modify project purposes or operations. Corps regulations would authorize 50,000 acre-feet of water from Oahe for industrial use. (J.A. 351). ETSI's contract is within this amount.

[5]The States of Missouri, Iowa and Nebraska were informed of this proposed redefinition by the chief planner for the Corps of Engineers, Missouri River Division, on November 13, 1986. The proposal would define "surplus water" as all flood waters stored in the reservoir. We were subsequently advised that this proposal is under consideration at Corps headquarters in Washington. The States of Iowa and Missouri have filed critical comments. The States have a duty to bring to this Court's attention recent developments which could affect the outcome of the case. *Fusari v. Steinberg*, 419 U.S. 379, 387, n.12 (1975).

ing uses. Interior has been on notice since 1974 of serious questions concerning its authority to market water for industrial use from these Army reservoirs. It has had, and still has, ample time to obtain Congressional amendment. The Court of Appeals properly interpreted the relevant statutes. If the 1944 Act causes "incongruous consequences," Congress can correct them. The fact that Interior and the *amici* are not happy with the provisions of the 1944 Flood Control Act does not provide a basis to reverse the Court of Appeals decision. It would be poor public policy to thwart Congressional intent by the strained interpretation Interior and the *amici* seek to impose on the 1944 Flood Control Act.[6]

5. The Ruling Below Properly Applies Established Principles of Deference to the Facts of This Case.

A. Interior's Claim of Authority Is Based Entirely on A Poorly Reasoned Legal Memorandum Which Is Directly Contrary to the Opinion of Army's Chief Attorney.

The Department of the Interior's position was based solely on an Interior Solicitor's memorandum. (Pet. App. 69a). That 1974 opinion did not analyze the text of section 9(c). The opinion did not mention the express authority granted Army in section 6 nor Congress' rejection of proposals which would have broadened Interior authority at

---

[6]ETSI and *amici* state a preference for reclamation law and for control by the Secretary of the Interior. This preference is, however, contrary to the decision that Army would build and control the main stem dams. (Pet. App. 47a). That Congress does not necessarily share this preference for reclamation law is also shown by section 212(a) of the Reclamation Reform Act of 1982, 43 U.C.S. § 390*ll*, under which reclamation law does not apply to even irrigation use of Army reservoirs such as Oahe in the absence of Interior irrigation works. (Pet. App. 30a, n.21).

Army reservoirs. This poorly reasoned memorandum, written thirty years after passage of the Act, is not entitled to deference. (Pet. App. 34a, n.25, 68a-69a).

Moreover the Army Acting Chief Counsel in 1974 concluded that Interior did not have independent authority to market water for industrial use from these Army reservoirs. (Pet. App. 10a-11a, 34a, n.25, 69a; Ct. App. J.A. 176). Here one enabling act governs two agencies, whose counsel reached opposite conclusions. Deference cannot be given to both. (Pet. App. 69a).

B. There Is No Long-Standing Interpretation to Which the Courts Should Defer.

The Department of the Interior has not assisted in the construction, operation, or maintenance of Oahe. (Pet. App. 20a, 55a-56a). It exercises no functions there.[7] It has never adopted regulations to govern "irrigation storage" at Oahe (Pet. App. 61a), and indeed there is no defined irrigation storage there. (Pet. App. 20a, 63a-64a). The department has repeatedly acknowledged that Lake Oahe is controlled by Army. (Pet. App. 20a-21a, 55a). It has not acted as if it had the plenary jurisdiction over "irrigation storage" it now claims.

Interior's current position is also inconsistent with the contemporaneous interpretation of Interior Secretary

---

[7]Interior's authority to market power generated by Army was transferred to the Department of Energy in 1977. 42 U.S.C. § 7152(a)(1)(E). The Bureau's primary function is irrigation, yet it has executed no irrigation contracts at Oahe and has discontinued construction of the only authorized irrigation work there. (Pet. App. 56a).

Harold Ickes, who "did not believe that this department had the authority which the appellants today assert."[8] (Pet. App. 29a).

C. Petitioners Rely on Legislative History Which Reflects A Proposal Which Was Not Enacted.

The 1944 Congress gave Army jurisdiction over Lake Oahe and over industrial use of its waters. It also rejected proposals to give Interior authority similar to that it now claims. (Pet. App. 26a-29a). Congress' rejection of these measures establishes that Congress did not intend to grant Interior this authority. (Pet. App. 29a).

The Solicitor General's argument cites legislative history suggesting that Interior has authority to adopt regulations for irrigation storage at Army reservoirs. (Hodel pet., p. 14-15). Subsequent to the cited statements, Congress rejected similar language in the bill and adopted the much more limited language of current section 8. (Pet. App. 26a-27a, 60a-62a). Another obvious problem with Interior's argument is that it has never defined, let alone regulated, irrigation storage at Oahe. (Pet. App. 20a, 63a-64a). The Court of Appeals fully considered, and prop-

---

[8]Congress rejected Secretary Ickes' proposed amendment to have reclamation law govern industrial marketing at Army reservoirs utilized for irrigation purposes under section 8. (Pet. App. 29a). In proposing that amendment, the Secretary recognized that section 6 "does not involve reclamation but covers merely the sale of water for domestic and industrial uses . . ." Flood Control: Hearings on H.R. 4485 Before a Subcommittee of the Committee on Commerce, 78th Cong., 2d Sess. 312 (1944) (statement of the Hon. Harold L. Ickes, Secretary of the Interior) (Pet. App. 28a-29a).

erly rejected, defendants' "shared jurisdiction" theory. (Pet. App. 21a-32a).

D. The Decision Below Does Not Conflict With Precedents of This Court.

The deference cases cited by petitioners concern deference to properly promulgated agency rules, adopted after notice and comment, or other formal agency interpretations. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3254 (1986). In each case this Court first found that the agency interpretations had a reasonable basis and concerned an issue entrusted to the agency by statute. The 1974 Interior Solicitor's memorandum, which is the sole agency interpretation upon which Interior relies, meets neither test and is not entitled to deference.

Contrary to ETSI's assertions, this Court does not "unqualifiedly" defer to agency interpretations of statutes. *See, e.g., Bowen v. American Hospital Association*, 106 S.Ct. 2101 (1986); *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S.Ct. 681 (1986); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 768, n.7 (1985); *United States v. Dion*, 106 S.Ct. 2216, 2222-2223 (1986).

The decision below does not present the question whether a court is free to substitute its own judgment in every case where an agency's jurisdiction or the scope of its statutory mandate is at issue. (*See* ETSI pet., p. 26, 29). Throughout its decision the Court of Appeals considered the actions and positions of the two agencies involved. There are many reasons why Interior's current

position is not entitled to deference. Review of the Court of Appeals decision would not resolve any significant question of administrative law.

6. This Case Does Not Present a Conflict Over State Water Rights.

The brief filed by South Dakota, North Dakota and Wyoming as *amici curiae* seriously mischaracterizes the decision of the Eighth Circuit. The *amici* state:

> The Eighth Circuit's ruling in *Missouri v. Andrews* placed the entire mainstem of the Missouri River under the exclusive control of the Army Corps of Engineers, deprived the Secretary of Interior of authority to devote any mainstem Missouri River water to reclamation purposes, and thus effectively denied the Upper Basin States of their right, power and authority to allocate waters wholly within their territorial boundaries.

Amici brief, p. 2. However, the Court of Appeals held only that the Secretary of the Interior lacked authority to market water for *industrial* use from reservoirs concededly under Army control; the Secretary of the Interior's authority to provide for *irrigation* use of Army reservoirs as provided in section 8 of the 1944 Act is not affected by the decision. Nor does the decision affect the mainstem of the Missouri River outside of Army reservoirs.

South Dakota, as *amicus curiae*, fully briefed its contentions below.[9] The Court of Appeals expressly rejected the argument that *Missouri v. Andrews* presented any

---

[9]North Dakota was also granted *amicus* status but did not file any briefs below.

issue concerning South Dakota's right to allocate water within its borders. (Pet. App. 14a, n.5). The Court also stated, ". . . our decision deals solely with the validity of the federal appellants' conduct." (Pet. App. 15a, n.7). The Solicitor General tacitly recognized this when he dropped the argument that South Dakota is an indispensable party. (Hodel pet., p. 11-12, n.12).

The proposal to consolidate certiorari review with an original action would convert this judicial review action into a dispute over abstract and obscure issues of state sovereignty. This is both inappropriate and untimely.[10] South Dakota's attempt to avoid proper appellate review mechanisms by filing an original action would only result in disruption and confusion.[11]

———o———

[10]South Dakota withdrew its motion to intervene on February 28, 1983, before the District Court reviewed the Magistrate's denial of intervention.

[11]South Dakota's proposed original action seeks to change the issues and the record in this case. South Dakota wants to tell this Court "the issues that ought to be before the Court and . . . how those issues ought to be resolved." (Renewed Motion for Leave to File Complaint, p. 6, *State of South Dakota v. State of Nebraska, et al.*, No. 103 Original, Supreme Court of the United States).

CONCLUSION

The States of Missouri, Iowa, and Nebraska respectfully pray that the petitions for a writ of certiorari be denied.

Respectfully submitted,

STATE OF MISSOURI

WILLIAM L. WEBSTER
Attorney General

CURTIS F. THOMPSON
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Tel. (314) 751-3321

STATE OF IOWA

THOMAS J. MILLER
Attorney General

ELIZABETH M. OSENBAUGH
Deputy Attorney General
ELIZA OVROM
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
Tel. (515) 281-5351

STATE OF NEBRASKA

ROBERT M. SPIRE
Attorney General

LE ROY W. SIEVERS
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENERGY TRANSPORTATION SYSTEMS INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4544
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
DISCUSSION	1
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962)	6
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	7, 9
County of Los Angeles v. Davis, 440 U.S. 625 (1979)	4
SEC v. Chenery Corp., 318 U.S. 80 (1943)	6

STATUTES AND RULES

Flood Control Act of 1944	*passim*
Del. Code Ann. tit. 8, § 278	2
Fed. R. Civ. P. 17	1

CONGRESSIONAL MATERIAL

Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944)	2, 3, 4, 8
Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works, 85th Cong., 1st Sess., Part 2 (1957)	8
Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources, Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., Part 1 (1975)	8
H.R. Rep. No. 2051, 78th Cong., 2d Sess. (1944)	3
H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944)	8
S. Doc. No. 191, 78th Cong., 2d Sess. (1944)	8
90 Cong. Rec. 4125 (1944)	3
90 Cong. Rec. 4133 (1944)	3
128 Cong. Rec. S8476-S8480 (daily ed. July 16, 1982)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-939

ENERGY TRANSPORTATION SYSTEMS INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF

In their oppositions to ETSI Pipeline Project's ("ETSI") petition for a writ of certiorari,[1] respondents

---

[1] The petition for certiorari was originally filed in the name of Energy Transportation Systems Inc., a Delaware corporation. On January 27, 1987, ETSI, a Delaware joint venture and the party that contracted with the Secretary of the Interior in the matter at issue, requested that it be substituted for Energy Transportation Systems Inc. as the real party in interest pursuant to Fed. R. Civ. P. 17. ETSI explained that, although the two entities had been treated interchangeably by the parties to this litigation, substitution would be desirable because the corporation has recently been dissolved. Indeed, in their opposition, respondents acknowledge that, in the litigation below, Energy Transportation Systems Inc. was "named to represent [ETSI Pipeline Project] as a party . . . ." Brief for Respondents, Kansas City Southern Railway, *et al.* at 5-6, 8. If the Court were to conclude for any reason that substitution of the joint venture were not appropriate, the corporation should be permitted to go forward. Under Delaware law, a dissolved corporation continues for a minimum of three years for purposes

make essentially five contentions: (1) that in 1944 the Secretary of the Interior twice sought and was twice denied the statutory authority he has claimed in this case; (2) that this case is moot; (3) that the Eighth Circuit's decision in any event affects only the ETSI contract; (4) that denial of water marketing authority to the Secretary of the Interior may be of little consequence inasmuch as the Secretary of the Army is currently considering broadening his own authority to market such water; and (5) that no deference is due the Secretary of the Interior's construction of Section 9 of the Flood Control Act because the Secretary had no authority even to construe that section. None of these contentions is correct, as we briefly explain below.

1. Respondents contend that, in entering into the ETSI contract, the Secretary of the Interior has sought to exercise authority that was twice denied him at the time Congress passed the Flood Control Act of 1944. This contention is not only inconsistent with the provisions of the Pick-Sloan Plan which Congress adopted in Section 9(a) of the Flood Control Act and with Congress' reaffirmation of the Secretary's authority in 1982; the contention is also refuted by the very legislative history on which respondents rely.

Respondents' first suggested instance in which Congress denied the Secretary the authority he has exercised here was a language change proposed by the then-Secretary of the Interior Harold Ickes. In a letter proposing the amendment, the Secretary explained briefly that the provisions of Section 6 of the House bill (ultimately Section 8 of the Act) "are not entirely apt in their relation to the various technical features of the Federal reclamation laws." *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th

---

of prosecuting and defending lawsuits. Del. Code. Ann. tit. 8, § 278. Thus, the dissolution should have no bearing on the petition for certiorari.

Cong., 2d Sess. 313 (1944) ("1944 Senate Hearings"). The House version the Secretary referred to expressly authorized Interior "to prescribe regulations" for the use of the storage available for irrigation at Corps reservoirs. In his oral testimony, the Secretary explained that he was seeking the amendment because Interior carries out its reclamation function through contracts rather than regulations:

> *The revision of Section 6 recommended in my report . . . is purely for purposes of clarification.* That section as it now stands [House Section 6] provides for the application of the Federal reclamation laws to the irrigation features of Army reservoir projects. However, *it is not drafted in a way that ties in with the basic provisions of the reclamation laws . . . as though they involved merely the imposition of regulations, whereas in truth they are largely designed to authorize a system of contractual relationships.* It disregards the problem of allocating costs for multiple-purpose facilities serving other uses in addition to irrigation.

Id. at 458 (emphasis added). The Conference Report explained that the amendment was adopted for precisely the reason offered by the Secretary. H.R. Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944). Nothing in this amendment indicates a congressional intent to limit the Secretary's authority over irrigation storage.

The second bit of legislative history respondents grasp at is the unsuccessful attempt by Secretary Ickes to retain for Interior the *exclusive* authority to market water for domestic and industrial purposes at any federal water project utilized even in part for irrigation. *See* 1944 Senate Hearings at 312-313. The debate in the House reveals, however, that what ultimately became Section 6 was not intended to limit Interior's authority, but simply to extend *to the Corps* a power that Interior's Bureau of Reclamation had long enjoyed. *E.g.*, 90 Cong. Rec. 4125 (1944) (remarks of Rep. Whittington); 90 Cong. Rec. 4133 (1944) (remarks of Rep. Curtis).

ETSI has not found any support for the claim that, in granting *the Corps* authority to market the storage it regulated, Congress intended to deny *the Secretary* his traditional authority to market unutilized irrigation storage for other purposes. Such a reading is irreconcilable with Secretary Ickes' contemporaneous understanding that Section 8 was intended to apply reclamation law "in all pertinent respects" to irrigation storage at Corps reservoirs. 1944 Senate Hearings at 458.

2. Although they have not cross-petitioned for certiorari on the issue of the lower courts' express determination that this case is not moot,[2] respondents here contend that "there is a real question whether this case presents any live controversy as to ETSI." Brief for Respondents, Kansas City Southern Railway, *et al.* at 8; *see also* Brief for Respondents, States of Missouri, *et al.* at 6. Certiorari should be denied, they argue, because ETSI terminated the *state* water use permit that underlay its now-enjoined federal contract.

This argument represents a classic attempt at bootstrapping. Having succeeded in enjoining ETSI's contract, respondents now argue that consequences flowing inevitably from that injunction render the controversy moot. That, of course, is not the law.[3] In any

---

[2] As noted in ETSI's Petition for Certiorari, the mootness issue was separately briefed and decided in the courts below after Respondents filed their "Suggestion of Mootness" in the Court of Appeals. *See* ETSI Pet. 17 n.24. The Court of Appeals remanded the case to the district court for factual findings. Following a hearing, the district court rejected, as a matter of fact, respondents' mootness contentions. That decision was subsequently affirmed by the Court of Appeals.

[3] In *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), this Court held that, when a party voluntarily suspends or terminates an allegedly improper activity, a judicial challenge to the legality of that activity is moot only if: (1) the alleged violation cannot

event, as the courts below correctly found, while ETSI terminated its state water use permit several months after the district court enjoined use of its federal contract, it did so to avoid a large payment obligation to South Dakota.[4] ETSI's *federal* contract has not been abandoned or terminated and, absent the Eighth Circuit's injunction, could be revived. Moreover, this federal contract, a valuable asset of ETSI's, is assignable. Even if ETSI permanently abandoned its pipeline plans, it could nevertheless assign its rights under the contract to others.[5] Thus, the legality of the contract with Interior remains an issue of concrete, ongoing concern to ETSI.

3. Respondents further claim that this case is not worthy of review because it affects only the ETSI contract. Undisputed record facts flatly contradict this assertion.

The Secretary has approved three other substantial contracts for water from Missouri River main stem reservoirs, one of which—like ETSI's contract—was executed after the Memorandum of Understanding ("MOU") between Interior and the Corps had expired. Regardless of when they were executed, however, all of the contracts explicitly invoked Section 9(c) of the Flood Control Act

---

reasonably be expected to recur; and (2) events have "completely and irrevocably eradicated" the effects of the alleged violation. *Id.* at 631. The courts below concluded that neither prong of the *Davis* test was satisfied.

[4] Respondents cite "Mootness Exhibit 10" as evidence that ETSI terminated its state permit "for other reasons" than the instant litigation. *See* Brief for Respondents, States of Missouri, *et al.* at 6. The cited Exhibit, however, is merely a copy of ETSI's letter to South Dakota terminating the permit; it indicates no "other reason" for termination except the payments due.

[5] Although the assignee would also need a state permit, South Dakota has clearly indicated its interest in agreeing to such a permit through its filings in this case.

as the source of the contracting authority. That provision grants authority exclusively to Interior; it has nothing to do with the Corps. If these existing contracts are not authorized by Section 9(c), they are not valid at all.[6] Moreover, the uncertainty over the Secretary's authority engendered by this litigation has undoubtedly discouraged others from renewing or going forward with additional contracts. *See* Brief for the State of Montana as Amicus Curiae at 2-3.

Furthermore, respondents' litigating posture below belies their present contention that the Secretary's water marketing authority is of little consequence. Until filing their "Suggestion of Mootness" in the Court of Appeals, respondents strongly argued that this case concerned the legality not only of the ETSI contract for 20,000 acre-feet of water, but also of Interior's entire "water marketing program, plan and policies" including a plan to "shift the use of *one million acre-feet* of water from authorized project purposes." *See, e.g.*, Plaintiff's Controverted Issues at 2-3 (Apr. 26, 1984) (emphasis added). In light of their prior posture, they cannot now credibly argue that the issue presented before the Court is insignificant and affects only ETSI's contract.

4. Respondents next assert that the Department of the Army is reconsidering its current 50,000 acre-foot guideline for "surplus water" marketing. While this assertion is apparently true, it has marginal, if any, relevance to this case. The Missouri River Division of the Corps, for example, has prepared a draft proposal to redefine "surplus water" to allow greater access to water for new uses, but no action on that or any other proposal appears imminent. At present, it is sheer speculation that the Corps will go forward and, if it does, that it can successfully defend against the serious challenges it would face concerning the legality of such action under

---

[6] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

Section 6 of the Flood Control Act. *See* ETSI Pet. 19-20. This Court should not base a decision to grant or deny certiorari on the mere possibility that an agency may change its policy sometime in the future.[7]

Moreover, the *Corps'* water marketing policy under Section 6 has little bearing on the central issue of this case, which is *Interior's* water marketing authority under Section 9 of the Flood Control Act. In that Act, Congress gave the two agencies concurrent jurisdiction over the water; Congress did not condition Interior's authority on the Corps' decision to market more or less water from the reservoirs. Nevertheless, under the Eighth Circuit's decision, Interior will have *no* authority to market the water.

5. The Eighth Circuit in this case held that the Secretary of Interior's "assertion of . . . authority" over Oahe water was "beyond his statutory mandate and therefore not entitled to judicial deference." ETSI Pet. App. 33a-34a. ETSI showed in its petition that acceptance of the Eighth Circuit's reasoning would completely subvert this Court's *Chevron* deference rule,[8] inasmuch as virtually every agency construction with which a court disagrees could be deemed to fall outside the agency's "statutory mandate." ETSI Pet. 25-30. Respondents do not defend the Eighth Circuit's reasoning; they instead contend that "[u]nlike this case, in [*Chevron* and its progeny] the statute under review unequivocally empowered the agency offering the interpretation to administer the provision in question." Brief for Respondents, Kansas City Southern Railway, *et al.* at 14 (footnote omitted). Re-

---

[7] Indeed, the Lower Basin States, including Iowa and Missouri, have vigorously opposed any change in the Corps' treatment of "surplus water" on both statutory and policy grounds. It is inconsistent for respondents to contend that this case has little consequence because the Corps may one day change its marketing policy when they elsewhere contend that any such change would be unlawful.

[8] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

spondents' position apparently is that where an agency construes a statutory provision that it clearly has no authority to construe, the agency's construction of that statutory provision is not entitled to deference. This may be a sound position, but it has nothing to do with this case.

The 1944 Flood Control Act is unquestionably a statute that the Secretary of the Interior is charged with enforcing; under Section 9(c) of that Act, "the reclamation . . . developments to be undertaken by the Secretary of the Interior . . . shall be governed by the federal reclamation laws . . . ." There can be no doubt that the Secretary is authorized to construe the meaning of the words "reclamation developments" in Section 9(c) of the Act, that he has construed those words to include the Oahe irrigation water here at issue, and that the governing reclamation laws permit him to market that water. Neither the Eighth Circuit's "statutory mandate" rationale nor respondents' suggestion that the Secretary had no authority to construe Section 9(c) at all[9] can

---

[9] Respondents also make two other subsidiary points regarding the Court of Appeals' refusal to defer to the Secretary's construction of the Flood Control Act. They first contend that the Secretary's construction is based "solely on an Interior Solicitor's [1974] memorandum." Brief for Respondents, States of Missouri, *et al.* at 9. That is not true. Both Interior and the Corps expressed this same construction in their 1944 testimony on the Flood Control Act, 1944 Senate Hearings at 458, 747; it was a clearly-articulated principle in the Pick-Sloan Plan, H.R. Doc. No. 475, 78th Cong., 2d Sess. 3-4 (1944); S. Doc. No. 191, 78th Cong., 2d Sess. 8, 11 (1944); the Assistant Solicitor of Interior advised Congress of this interpretation in 1957, *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works*, 85th Cong., 1st Sess., Part 2, at 313-353 (1957); the Corps and Interior jointly advised Congress of this interpretation in 1975 when they executed the MOU, *Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources, Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess.,

reconcile the lower court's decision with the clear contrary command of *Chevron* and its progeny.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4544
Counsel for Petitioner

* Counsel of Record

Part 1, at 5-6 (1975); and Interior and the Corps reaffirmed this understanding in testimony on the Reclamation Reform Act of 1982, 128 Cong. Rec. S8476-S8480 (daily ed. July 16, 1982).

Second, the State respondents claim that deference cannot logically be given to an agency where, as here, "one enabling act governs two agencies, whose counsel reached opposite conclusions." Brief for Respondents, States of Missouri, *et al.* at 10. But the two agencies in this case certainly did *not* reach opposite conclusions regarding the Secretary of the Interior's authority under Section 9. Rather, as ETSI explained in its petition, both of the agencies charged with administration of the Flood Control Act have taken the position—and have reported to Congress—that the Secretary of the Interior *has* authority under Section 9 of the Act to conduct the water marketing program here at issue. *See* ETSI Pet. 13-16.

(3) 3

Supreme Court, U.S.
FILED
SEP 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-939, 86-941

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

STATE OF MISSOURI, ET AL.,
Respondents

ENERGY TRANSPORTATION SYSTEMS, INC.,
Petitioner,

v.

STATE OF MISSOURI, ET AL.,
Respondents

BRIEF FOR THE STATES OF NORTH DAKOTA, SOUTH DAKOTA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

NICHOLAS J. SPAETH*
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

ROGER A. TELLINGHUISEN
Attorney General of South Dakota
GIBSON, DUNN & CRUTCHER
Charles J. Meyers*
1801 California St., Suite 4200
Denver, Colorado 80202
(303) 298-7200

JOSEPH B. MEYER*
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

* Counsel of Record

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-941

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

STATE OF MISSOURI, ET AL.,
Respondents

No. 86-939

ENERGY TRANSPORTATION SYSTEMS, INC.,
Petitioner,

v.

STATE OF MISSOURI, ET AL.,
Respondents

BRIEF FOR THE STATES OF NORTH DAKOTA, SOUTH DAKOTA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

The States of North Dakota, South Dakota, and Wyoming as *amici curiae* pursuant to Supreme Court Rule 36.4 urge that this Court grant the petitions for a writ of certiorari in the above-captioned cases in order to review the decision of the United States Court of Appeals for the Eighth Circuit in *Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986).

The States of North Dakota, South Dakota, and Wyoming comprise a substantial portion of the Upper Basin of the Missouri River. The Upper Basin States have no current dispute amongst themselves about the allocation and use of water from the mainstem of the Missouri River. The Upper

Basin States do have a significant dispute with the Lower Basin States of Missouri, Nebraska, and Iowa — Respondents herein — as a result of the Respondent States' lawsuit herein and associated actions intended to deprive the Upper Basin States of their right, power and authority to use or allocate the waters of the Missouri River stored for reclamation and irrigation purposes behind mainstem dams within the territorial boundaries of the Upper Basin States.

The Eighth Circuit's ruling in *Missouri v. Andrews* placed the entire mainstem of the Missouri River under the exclusive control of the Army Corps of Engineers, deprived the Secretary of Interior of authority to devote any mainstem Missouri River water to reclamation purposes, and thus effectively denied the Upper Basin States of their right, power and authority to allocate waters wholly within their territorial boundaries. The Eighth Circuit thus grossly misconstrued the compromise reached in the Pick-Sloan Plan that Congress codified in the Flood Control Act of 1944. As the Solicitor General has recognized, if the Eighth Circuit's decision is not reversed, it will "seriously undermine the concept of shared jurisdiction that is central to the Pick-Sloan Plan, and [will] unjustifiably restrict the government's ability — and the ability of the states in which the water is stored — to dedicate to beneficial uses the vast quantities of water that have been stored in the multi-purpose reservoirs created pursuant to the Plan." *Hodel v. Missouri,* No. 86-941, *Petition For A Writ of Certiorari*, at 17.

North Dakota, South Dakota and Wyoming believe it is essential that this Court review the issues regarding the Missouri River that were presented to the Eighth Circuit in *Missouri v. Andrews.* They believe the Court should grant South Dakota's Renewed Motion For Leave To File Complaint in *South Dakota v. Nebraska,* No. 103 Original, and consolidate that case with those in issue here. Such consolidation would promote two worthy objectives: (1) the conservation of judicial resources; and (2) ensuring that the broader states' rights issue

directly implicated by the *Missouri v. Andrews* decision is fully addressed.

Therefore North Dakota, South Dakota and Wyoming urge that this Court grant the petitions for a writ of certiorari in the instant cases and further urge that the Court consolidate its consideration of these cases with the renewed original action in *South Dakota v. Nebraska,* No. 103 Original.

Respectfully submitted,

THE STATE OF
NORTH DAKOTA

Nicholas J. Spaeth*
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

THE STATE OF
SOUTH DAKOTA

Roger A. Tellinghuisen
Attorney General of South Dakota
Charles J. Meyers*
Gibson, Dunn & Crutcher
1801 California Street,
42nd Floor
Denver, Colorado 80202
(303) 298-7200

THE STATE OF WYOMING

Joseph B. Meyer*
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

*Counsel of Record

JANUARY 1987

Supreme Court, U.S.
FILED
JAN 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-941

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

No. 86-939

ENERGY TRANSPORTATION SYSTEMS, INC.,

Petitioner,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

BRIEF FOR THE STATE OF MONTANA AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

MICHAEL T. GREELY*
Attorney General
STATE OF MONTANA
Justice Building
215 North Sanders
Helena MT 59620
(406) 444-2026

*Counsel of Record

QUESTION PRESENTED IN NO. 86-941

Whether the Secretary of the Interior may enter into a contract, pursuant to the Federal Reclamation Laws, to supply unutilized irrigation water from a Missouri River mainstem reservoir for industrial use.

QUESTIONS PRESENTED IN NO. 86-939

1. Whether the Court of Appeals improperly substituted its own view for that of the Secretary of the Interior concerning the appropriate construction of the Flood Control Act of 1944.

2. Whether the Secretary of the Interior is authorized under the Flood Control Act of 1944 to contract for the beneficial use of irrigation water stored in the mainstem reservoirs of the Missouri River Basin.

TABLE OF CONTENTS

Page

QUESTION PRESENTED IN NO. 86-941.....i

QUESTIONS PRESENTED IN NO. 86-939.....i

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICUS CURIAE.....2

ARGUMENT.....3

CONCLUSION.....4

TABLE OF AUTHORITIES

Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887.....3

1985 Mont. Laws. ch. 573, § 13, *codified in* Mont. Code Ann. § 85-2-141 (1985).....3

No. 86-941

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

No. 86-939

ENERGY TRANSPORTATION SYSTEMS, INC.,

Petitioner,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

BRIEF FOR THE STATE OF MONTANA AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

The State of Montana, through its Attorney General, respectfully appears as *amicus curiae* pursuant to S. Ct. R. 36.4 in support of the petitions for a writ of certiorari in the above matters.

INTEREST OF AMICUS CURIAE

Approximately three-quarters of Montana lies within the Missouri River Basin, and one of that river's six mainstem dams and associated reservoirs, Fort Peck, is located in the northeastern part of the state. Completed in 1940, the Fort Peck facility has a maximum reservoir-storage capacity of approximately 19 million acre-feet--the third largest of the mainstem reservoirs.

In September 1976 the Montana Department of Natural Resources and Conservation (Department) entered into a contract with the United States Department of the Interior, Bureau of Reclamation, which provided, *inter alia*, that a maximum of 300,000 acre-feet of water would be made available for diversion from Fort Peck Reservoir for industrial and other incidental beneficial uses within Montana. Any diversions from the reservoir were to be effected through subcontracts between the Department and entities desiring to utilize the water. Because no such subcontracts were ever reached and because of the Bureau of Reclamation's uncertainty concerning its authority after the decision below, the contract was not extended and

terminated automatically in September 1986. Despite the contract's termination, however, there remains the possibility of substantial industrial development--including the mining of vast coal deposits in the southeastern part of the state--which may in the future make desirable or essential contracts of the kind recently terminated. Indeed, the Montana Legislature recently enacted a comprehensive water leasing program which provides for utilization of waters from, *inter alia*, the Fort Peck Reservoir. 1985 Mont. Laws, ch. 573, § 13, *codified in* Mont. Code Ann. § 85-2-141 (1985). Montana is vitally concerned that the majority opinion below of the Court of Appeals will significantly disrupt the relationship between the federal government and the several Upper Missouri River Basin states, including itself, which has been premised on an assumption that the Bureau of Reclamation possessed regulatory authority over irrigation storage within those reservoirs and that exercise of such authority was governed by section 9(c) of the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, 891.

ARGUMENT

Montana concurs in the petitions filed herein. The decision below reflects not only a construction of section 9(c) which is directly contrary to administrative interpretation and practice but also endangers the very core of the Flood Control Act. The decision accordingly places the entirety of

the Oahe Reservoir storage, and very possibly the storage in the remainder of the mainstem reservoirs, under the exclusive control of the United States Army Corps of Engineers, whose regulatory interest lies largely in nondiversionary use of Missouri River water for flood control, hydroelectric and navigation purposes and whose actions are, unlike those of the Bureau of Reclamation, not subject to federal reclamation laws. The decision will thus effectively vitiate the very underpinning of the Flood Control Act--the shared, coordinate responsibility of the Corps of Engineers and the Bureau of Reclamation unequivocally mandated by the Pick-Sloan plan--for managing the mainstem reservoirs. The flawed nature of the decision's reasoning, together with its importance as to future use of mainstem reservoir waters, clearly merits review.

CONCLUSION

The State of Montana respectfully requests that the petitions for a writ of certiorari in these matters be granted.

Respectfully submitted,

MICHAEL T. GREELY*
Attorney General
STATE OF MONTANA
Justice Building
215 North Sanders
Helena MT 59620
(406) 444-2026

*Counsel of Record

January 1987

Supreme Court, U.S.
FILED
MAY 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-939, 86-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ETSI PIPELINE PROJECT,
Petitioner,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

JOINT APPENDIX

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
HOGAN & HARTSON
(a partnership including professional corporations)
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6544
Counsel for Petitioner ETSI Pipeline Project

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Federal Petitioners

WILLIAM L. WEBSTER
Attorney General
CURTIS F. THOMPSON *
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321
Counsel for State of Missouri

ROBERT M. SPIRE
Attorney General
LE ROY W. SIEVERS *
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
Counsel for State of Nebraska

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

PETITIONS FOR CERTIORARI FILED DECEMBER 8, 1986
CERTIORARI GRANTED MARCH 2, 1987

THOMAS J. MILLER
Attorney General
ELIZABETH M. OSENBAUGH *
Deputy Attorney General
ELIZA OVROM
Assistant Attorney General
Hoover State Office Bldg.
Des Moines, IO 50319
(515) 281-5351
Counsel for State of Iowa

STEPHEN E. ROADY *
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700
Attorney for The Kansas City Southern Railway Company

RONALD J. WILSON *
SIERRA CLUB LEGAL DEFENSE FUND
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
Attorney for The Sierra Club

WILLIAM E. WALTERS, III *
WALTERS & THEIS
2015 York Street
Denver, CO 80205
Attorney for the Iowa, Nebraska and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America

RODNEY M. CONFER
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, NE 68508
Of Counsel

JOINT APPENDIX

TABLE OF CONTENTS

Page

Docket Entries, *Missouri, et al. v. Andrews, et al.*, No. CV-82-L-442, United States District Court for the District of Nebraska 1

Docket Entries, *Kansas City Southern Railway Co., et al. v. Andrews, et al.*, No. CV-82-L-443, United States District Court for the District of Nebraska..... 42

Docket Entries, *Missouri, et al. v. Andrews, et al.*, Case Nos. 84-1675, 84-1719, 84-1720, 84-1721, United States Court of Appeals for the Eighth Circuit....81, 93, 102, 111

Memorandum from the Solicitor, United States Department of the Interior to the Secretary of the Interior (November 27, 1974). Administrative Record ("AR") 900065 120

Memorandum for the Chief, Office of Civil Functions, United States Army Corps of Engineers, from Richard V. Kearney, Acting General Counsel (December 16, 1974). AR 900407 128

Memorandum of Understanding Between the Secretary of the Interior and the Secretary of the Army (February 24, 1975) and extensions through December 31, 1978. AR 900072 136

Letter from Howard H. Callaway, Secretary of the Army, to Rogers C.B. Morton, Secretary of the Interior (March 18, 1975). AR 900089 142

Letter from Colonel C.A. Selleck, Jr., Division Engineer, Missouri River Division, Army Corps of Engineers, to E.R. Wilde, Acting Regional Director, Upper Missouri Region, Bureau of Reclamation (October 4, 1978). AR 900399 143

Industrial Water Service Contract Between the United States and Basin Electric Power Cooperative (December 28, 1978). AR 900204. Preamble only 145

Industrial Water Service Contract Between the United States and ANG Coal Gasification Company (November 9, 1979). AR 900225. Preamble only 146

TABLE OF CONTENTS—Continued

Page

Memorandum from Commissioner of the Bureau of Reclamation, to the Assistant Secretary, Land and Water Resources (concurred in by the Assistant Secretary) (November 5, 1980). AR 302599-601 147

Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Pipeline Project (December 23, 1981). AR 500696 152

Corps of Engineers, Project Purpose Planning Guidance, Regulation ER 1105-2-20 (January 29, 1982). Excerpt 207

Colonel V.D. Stipo, Army Corps District Engineer, Findings of Fact (June 10, 1982). AR 930314. Paragraph I only 211

Memorandum from Commissioner, Bureau of Reclamation, to the Secretary of the Interior (June 22, 1982). AR 500929 212

Industrial Water Service Contract Between the United States and ETSI Pipeline Project, A Joint Venture (July 2, 1982). AR 900331, AR 900428 224

Letter from Energy Transportation Systems Inc. to the South Dakota Conservancy District (July 31, 1984), Exhibit to Deposition of Paul Doran (January 9, 1985) 257

Order Granting Petitions for Writs of Certiorari (March 2, 1987) 259

The following items have already been reproduced at the following pages in the Appendix to ETSI Pipeline Project's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, and are not reproduced again in this Joint Appendix:

Appendix A Opinion of the United States Court of Appeals for the Eighth Circuit, dated March 13, 1986 ..... 1a

TABLE OF CONTENTS—Continued

		Page
Appendix B	Opinion of the United States District Court for the District of Nebraska on Cross Motions for Partial Summary Judgment, dated May 3, 1984	45a
Appendix C	Judgment of the United States Court of Appeals for the Eighth Circuit, dated March 13, 1986	73a
Appendix D	Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearings by the Panel and *en banc*, dated July 10, 1987	74a
Appendix E	Flood Control Act of 1944, Pub. L. No. 78-534, §§ 1-9, ch. 665	76a

The following items have already been reproduced at the following pages in the Appendix to the Reply Brief for the Federal Petitioners on the Petition for Certiorari and are not reproduced again in this Joint Appendix:

Order of the United States Court of Appeals on Mootness, dated April 22, 1985	1a
Memorandum and Order of the United States District Court for the District of Nebraska on Mootness, dated February 12, 1985	3a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 82-L-442

THE STATE OF MISSOURI, *et al.*,
Plaintiffs

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1982		
Aug 18	1	Complaint with request for injunctive and declaratory relief and request for place of trial at *Lincoln.*
		Summons issued—to Marshal.
Sep 3	2	Summons with returns
Sep 10	3	State of Missouri's request for waiver pursuant to local rule 5F.
	4	State of Iowa's request for waiver pursuant to local rule 5F.
Sep 13	5	*Order (WKU) admitting Robert M. Lindholm to practice* for this case only
	6	*Order (WKU) admitting Elizabeth M. Osenbaugh* to practice for this case only Copies mailed to attorneys Lindholm and Osenbaugh

DATE	NR.	PROCEEDINGS
1982		
Sep 21	7	Motion of Energy Transportation Systems Inc. to intervene
Sep 27	8	State of Missouri's request for waiver pursuant to local Rule 5F.
Oct 1	9	Entered Application and *Order (WKU) filed 9-29-82 admitting Curtis F. Thompson* to practice for this case only. Copy mailed to Curtis Thompson and Roderick Anderson.
	10	Motion of State of South Dakota to intervene as defendant and request for hearing with copy of answer attached
	11	Affidavit of William J. Janklow in support, with attachments
	12	Answer of State of South Dakota
	13	South Dakota's motion to file additional motions
Oct 1	14	Plaintiffs' response to motion of Energy Transportation Systems Inc. to intervene with request that proposed intervenor be required to comply with Rule 24(c)
Oct 8	15	Order (DLP) giving ETSI until 10-15-82 to file pleadings re motion #7 to intervene and giving plaintiff States until 10-25-82 to respond, etc. Copy mailed to counsel of record and counsel for ETSI
	16	Entered appearance of counsel for government, filed 10-6-82

DATE	NR.	PROCEEDINGS
1982		
Oct 12	17	Defendants' response to Energy Transportation Systems Inc.'s motion for intervention.
	18	Plaintiffs' motion for time to reply to motion of State of South Dakota to intervene
Oct 13	19	Proposed answer of intervenor-defendant ETSI, with attachment
	20	Order (DLP) giving plaintiffs until 10-28-82 to reply to motion to intervene by State of South Dakota and to file additional motions Copy mailed to counsel of record and counsel for ETSI
Oct 15	21	Federal Defendants' response to motion to intervene.
	22	Federal Defendants' answer.
Oct 20	23	Amended certificate of service of Answer by federal defendants
Oct 21	24	Federal Defendants' response to motion to consolidate.
Oct 26		Entered 2 pleadings, filed 10-25-82:
	25	Plaintiffs' motion for time to respond to ETSI's motion for intervention, with affidavit of G. Roderic Anderson attached
	26	Order (DLP) giving plaintiffs until 10-28-82 to respond to ETSI's motion to intervene Copy mailed to counsel of record and counsel for ETSI
Oct 28	27	Plaintiffs' opposition to motions of State of South Dakota and ETSI to intervene
	28	Plaintiffs' resistance to South Dakota's motion for leave to file additional motions
Oct 29	29	*Application and Order (WKU) for Daniel J. Doyle* to practice for this case Copy mailed to Mr. Doyle

DATE	NR.	PROCEEDINGS
1982		
	30	*Application and Order (WKU) for Curtis Glen Wilson* to practice for this case Copy mailed to Mr. Wilson
	31	*Application and Order (WKU) for Warren R. Neufeld* to practice for this case Copy mailed to Mr. Neufeld
Nov 1	32	Request of ETSI for oral argument on motion of intervention
	33	Plaintiffs' motion to file corrected opposition to State of South Dakota and ETSI motion to intervene, with attachments
Nov 2	34	Plaintiffs' response to motion to consolidate
Nov 4	35	Application and *Order (WKU) for Thomas J. Welk to practice for this case* Copy mailed to Mr. Welk
Nov 5	36	Motion of South Dakota to respond to plaintiffs' opposition to SD's motion for intervention
	37	Intervenor South Dakota's request for hearing on motion for intervention
Nov 8	38	Entered Order (DLP) filed 11-5-82 giving state of SD until 11-10-82 to submit reply brief re motion to intervene Copy mailed to counsel of record
Nov 15	39	South Dakota's certificate of service of brief re intervention
Nov 30		Entered 2 pleadings filed 11-29-82:
	40	Memorandum and Order (DLP) denying motion to file corrected substitute filing (#33), denying request for oral argument (#32); granting motion for intervention of ETSI (#7)

DATE	NR.	PROCEEDINGS
1982		
	41	Order (DLP) granting request of State of SD for oral argument on motion to intervene but denying request for evidentiary hearing; oral argument set for 12-13-83 at 9:00 a.m. Copies mailed to counsel of record
Dec 9	42	Motion of ETSI for continuance of oral argument
Dec 13	43	Entered Order (DLP), filed 12-10-82, continuing oral argument to 12-20-82 at 2:00 p.m. Copy mailed to counsel of record
Dec 16	44	Motion of Donn E. Davis for admission of William Linsenbard to practice for this case only
	45	Motion of Donn E. Davis for admission of James A. Hourihan, George U. Carneal and David J. Hayes to practice for this case only
Dec 20	46	*Order (DLP) admitting George U. Carneal to practice for this case only*
	47	*Order (DLP) admitting William E. Linsenbard to practice for this case only*
	48	*Order (DLP) admitting James A. Hourihan to practice for this case only*
	49	*ORDER (DLP) admitting David J. Hayes to practice for this case only*
	50	Courtroom minutes—before Magistrate Piester—hearing on motion to intervene of State of SD (#10)—submitted upon expiration of brief time Copies #'s 46, 47, 48 & 49 mailed to respective counsel and Attorney Donn Davis

DATE	NR.	PROCEEDINGS
1983		
Jan 13	51	Entered Memorandum and Order (DLP), filed 1-12-83, denying motions of South Dakota to intervene, #10, and to file additional motions, #13 Copy mailed to counsel of record
Jan 24	52	Motion of State of SD to appeal order of Magistrate of 1-12-83
Jan 25	53	Order (WKU) giving State of SD leave to appeal order of Magistrate by 1-25-83
	54	Appeal by State of SD to order of Magistrate of 1-12-83 Copies of #'s 53 and 54 mailed to counsel of record
Jan 27	55	Appeal by State of SD to order of Magistrate of 1-12-83
	56	Certificate of service
Feb 3	57	Energy Transportation Systems' motion for Judgment on the Pleadings, or, Partial Summary Judgment.
	58	Plaintiffs' Notice of Intention to file responsive brief re appeal.
Feb 15	59	Plaintiffs' notice of reliance upon facts not established by the pleadings
Feb 18	60	Plfs' motion for time to respond to ETSI's motion for judgment on the pleadings or for partial S. J., with attachments
	61	Plfs' interrogs to Corps of Engineers
	62	Plfs' interrogs to Dept. of Interior & Robert N. Broadbent
Feb 25	63	Order (WKU) granting plfs.' motion #60 for time to respond to ETSI's mot. for s.j. Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Mar 1	64	Notice of State of South Dakota of withdrawal of motion to intervene and appeal from magistrate to court
	65	Motion of State of South Dakota to participate as amicus curiae
	66	Certificate of service of pleadings 64 & 65
Mar 4	67	Request of ETSI for scheduling conference
Mar 8	68	Entered Order (DLP) filed 3-7-83 giving plaintiffs to 3-11-83 to submit response to motion to consolidate with CV82-L-443 Copy mailed to all counsel of record
	69	Federal defendants' motion for reconsideration of court's order of 2-25-83
	70	Federal defendants' motion for protective order
	71	Federal defendants' motion for conference with the court
Mar 14	72	Memorandum and Order (DLP) consolidating with CV82-L-443 for trial; granting South Dakota's motion to participate amicus curiae (#65); setting preliminary conference 4-7-83 at 9:00 a.m. (#67 & #71) Copy mailed to all counsel of record
	73	Defendants' motion to dismiss
Mar 23	74	Entered ETSI's motion for reconsideration of order gr. pls addtl time to respond to motion for judgment on the pleadings or for partial S.J., filed 3-4-83.
Mar 24	75	Pl States' req. for time to respond to motion to dismiss of Federal dfs.
Mar 25	76	Fed. Dfs' renewed motion for Protective Order.

DATE	NR.	PROCEEDINGS
1983		
Apr 7	77	Memorandum and Order (WKU) denying renewed motion for protective order (#76) and denying motions for reconsideration (#69 and 74) Copy mailed to all counsel of record
	78	Order (WKU) giving plaintiffs until a date to be set by magistrate to respond to motion to dismiss (granting motion #75) Copy mailed to all counsel of record
Apr 8	79	Appearance of Marti, Dalton law firm for ETSI
Apr 15	80	Memorandum and Order (DLP) on preliminary pretrial held 4-8-83—discovery conference set 6-28-83 at 9:00 a.m. Copy mailed to all counsel of record.
Apr 22	81	Motion of state of North Dakota to appear as Amicus Curiae with affidavit of Allen I. Olson attached
	82	Certificate of Service
Apr 27	83	Certif. of service by St. of So. Dakota
	84	Entered fed. defs.' notice of serv. of ans. to interrogs, filed 4-26-83
May 2	85	Federal dfs' motion to limit discovery.
	86	Df Energy Transportation Systems' motion to limit discovery.
	87	Federal dfs' certified Index to Administrative Record.
May 9	88	Pls' response to request of North Dakota to appear as Amicus Curiae.

DATE	NR.	PROCEEDINGS
1983		
May 11	89	Entered Order (DLP) filed 5-10-83 that State of North Dakota may appear as an Amicus Curiae. Copy mailed to counsel of record.
	90	Plfs.' motion to compel discovery fm. federal defs. in CV82-L-443
	91	Aff. of Stephen E. Roady
May 12	92	Mot. of ETSI for time to respond to mot. of No. Dakota to appear as amicus curiae
May 16	93	Pls' motion for admission of Frederick S. Middleton to practice this case.
May 17	94	Plf. States' motion to compel ans. to interrogs. & for sanctions, w. aff. of G. Roderic Anderson
	95	Order (DLP) denying ETSI's motion #92 as moot Copy mailed to counsel of record
May 18	96	Application & *Order (DLP) admitting Frederick S. Middleton III to practice this case only* Copy mailed to Attys. Middleton & Confer
May 20	97	Motion of ETSI joining Federal Defendants' motion to dismiss
May 23	98	Entered Fed. Dfs' motion for leave to file reply memorandum filed 5-20-83.
May 23	99	Joint motion of all defendants for oral argument on defs' motions to dismiss
May 26	100	Federal defs.' response to plf. States' mot. to compel ans. to interrogs. & for sanctions
May 31	101	Order (WKU) granting motion #98, giving federal defendants leave to submit reply memorandum Copy mailed to all counsel of record

DATE	NR.	PROCEEDINGS
1983		
June 2	102	Motion of ETSI for leave to submit reply memo re plfs.' opposition to motion to limit discovery
June 3	103	Plfs.' in CV82-L-443 response to defs.' motion for oral argument
June 6	104	Plfs.' motion for admittance of Ellen M. Mahan to practice for this case only
June 7	105	Application & *Order (WKU) admitting Ellen M. Mahan to practice this case only* Copy mailed to Attys. Mahan & Confer
Jun 10	106	Appl. & *Order (WKU) admitting Mary Anne Sullivan to practice this case only* Copy mailed to Attys Sullivan & Bruckner
Jun 22	107	Plfs.' joint motion to direct federal defs. to give them timely access to record
Jun 23	108	Entered Order (DLP), filed 6-22-83, denying motion #107 as moot Copy mailed to counsel of record
Jun 24		Entered 2 pleadings, filed 6-23-83:
	109	Memorandum and Order (DLP) granting motions—to limit discovery—in part, filed federal defs. & ETSI, filings 85 & 86
	110	Memorandum and Order (DLP) granting in part motion of plf. states, #94, directing federal defs. to ans. interrogs. & for sanctions Copies mailed to counsel of record
Jul 1	111	Entered Memorandum and Order (DLP), filed 6-30-83, on disc. conf. 6-28-83-setting deadlines for filing motions, etc.—sch. final P.T. 1-31-84 at 9:00 a.m.—trial 2-13-84 at 9:00 a.m. as back-up to CV80-L-56 & CV75-L-96 Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Jul 8	112	Pls' motion for clarification and reconsideration of 6-23-83 order.
Jul 11	113	Motion of K.C. So.RW to file suppl. resp. & aff. concerning standing
Aug 5	114	Pls' motion to compel answers to interrogatories with affidavit of Curtis F. Thompson attached.
Aug 8	115	Motion of Plaintiffs in CV82-L-443 to compel answers to interrogatories, with affidavit of Stephen E. Roady attached
Aug 11	116	Motion of Crosby, Guenzel law firm to withdraw as counsel for df ETSI
	117	Affidavit on Donn E. Davis in support of motion to withdraw
Aug 18	118	Pls' notice to take deposition
Aug 19	119	Memorandum & Order (DLP) granting motion for clarification (#112) Copy mailed to counsel of record
Aug 22	120	Federal dfs' motion for leave to file response to motion to compel ans. to interrogs
Aug 24	121	Order (DLP) that Crosby, Guenzel law firm may withdraw as counsel for df ETSI
Sep 2	122	Order (DLP) giving federal dfs time to file response (#120) Copy mailed to counsel of record
Sep 16	123	Df Energy Transportation Systems' 1st request for production
Sep 20	124	Order (DLP) that federal defendants submit copies of certain documents re discovery within 10 days, etc. Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Oct 3	125	Pls' motion (in CV82-L-443) to serve more than 50 interrogs. upon df ETSI, w. attchmts
	126	Pls' notice of service of 1st set of interrogs. to ETSI, request to produce, motion #12
	127	ETSI's motion for production of documents utilized by pls' experts
Oct 4	128	Pls' motion (in CV82-L-443) to compel discovery, w. aff. of Stephen E. Roady & attchmts.
Oct 6	129	Df Energy Transportation System's certificate of service re discovery documents
Oct 11	130	Joint motion of federal defendants and Df ETSI for protective order
	131	Pls' motion (in CV82-L-443) for admission of non-resident attorney
Oct 12	132	Application & *Order (WKU) admitting William E. Walters III to practice this case only* Copy mailed to attorneys Walters and Confer
Oct 14		Entered 2 pleadings filed 10-13-83:
	133	Memorandum and Order (DLP) granting pls' motion #114 in part, federal dfs to produce certain documents within 15 days, etc. Copy mailed to all counsel of record
	134	Affidavit of Helena M. Troy in support of ETSI's motion for protective order
	135	Motion of federal dfs & ETSI to strike pls' submissions as to expert witnesses
	136	Federal dfs' motion for oral argument re discovery motions

DATE	NR.	PROCEEDINGS
1983		
	137	Federal dfs' motion for leave to submit suppl. memo in support of motion for protective order
Oct 17	138	Pl States' motion in CV82-L-442 for leave to amend complaint with copy attached
	139	Pls' motion in CV82-L-443 for leave to supplement and amend complaint with copy attached
Oct 19	140	Federal dfs' motion to file response to pls' motion to compel in CV82-L-443 out of time
Oct 21	141	Fed. dfs' motion for reconsideration of Magistrate's order of 10-13-83
	142	Memo & Order (DLP) *granting pls' motion in CV83-L-443 to serve more than 50 interrogs.* df ETSI's motion to produce, #127, in part, fed dfs' motion #137 to submit suppl. memo in support of motion for protective order & motion in CV82-L-443, to submit response to motion to compel, #144, out of time, etc. Copy mailed to counsel of record
Oct 25	143	Pls' motion for partial S. J.
	144	Pls' opposition to motions to dismiss & for partial S. J., etc.
	145	Pls' certificate of service
Oct 27		Entered 2 pleadings filed 10-26-83:
	146	Application and Order (WKU) *admitting Eliza Ovrom to practice for this case only*
	147	Application and Order (WKU) *admitting John P. Sarcone to practice for this case only* Copy of filings 146 & 147 mailed to Eliza Ovrom, John P. Sarcone and G. Roderic Anderson

DATE	NR.	PROCEEDINGS
1983		
Oct 28		Entered 2 pleadings filed 10-27-83:
	148	Pl States' adoption of motion of pl KCSI in CV82-L-443 to compel discovery with attachments
	149	Pl States' notice of filing of *depositions* of Richard D. Traylor, Ralph Miller, Frank E. Ellis, Terrence Martin and Lillian Stone in support
	150	Pls' motion in CV82-L-443 for partial S.J. with statement of material facts attached
	151	Pls' motion in CV82-L-443 to file opposition to dfs' motion to strike submissions as to expert witnesses out of time
Oct 31	152	Pls' motion to remand to Department of Interior for compilation & certification of administrative record
Nov 1	153	ETSI's motion for summary judgment
Nov 3	154	Pls' certificate of service of interrogatories and request for production to Energy Transportation
	155	Memo & Order (DPL) granting pls' motion to compel discovery (#132 in CV82-L-443) granting dfs' joint motion, #130, for protective order in part, and otherwise denying; and denying federal dfs' motion #136 for oral argument Copy mailed to counsel of record
	156	Attachment to pl states' memo in opposition to dfs' joint motion for protective order, filed at Magistrate's request in Memo & Order, #155
	157	Attachment to brief of pls in CV82-L-443 in opposition to dfs' joint motion for protective order, filed at Magistrate's request, etc.

DATE	NR.	PROCEEDINGS
1983		
	158	Attachment to suppl.memo of fed.dfs in support of dfs' mot. for protective order filed 10-11-83, filed at Magistrate's request, etc.
Nov 4	159	Pls' (in CV82-L-443) submission of affidavit of Rodney M. Confer re dfs' motion to strike pls' submissions as to experts, with attachment
Nov 7	160	Pls' certificate of service of pl States' 1st request for production
Nov 7	161	Affidavit of Rodney M. Confer, w. attchmts.
	162	Fed Dfs' motion for time to respond to motion by pl to remand
Nov 8	163	Memo & Order (DLP) denying dfs' motion to strike pls' submissions as to expert witnesses, #135, to certain extent w/o prejudice to its renewal, and in all other respects denying said motion Copy mailed to counsel of record
	164	Motion of ETSI for leave to submit reply brief re: dfs' motion to strike pls' submission as to expert witnesses, with attachment
Nov 10	165	Pls' certif. of service re response to ETSI's request for production, etc.
	166	K.C. So. Railway, et al's certif. of service of response & objections of pls in CV82-L-443 to ETSI's 2nd request for production, etc.
	167	Memo & Order (DLP) granting pls' motion #138 to amend complaint and motion #143 in CV82-L-443 to amend complaint, and giving parties to 11-18-83 to file same Copy mailed to counsel of record
Nov 14	168	Pls' motion in CV82-L-443 for partial reconsideration of court's order of 11-3-83 with Vols. 1 & 2 of Final Environmental Impact Statement attached

DATE	NR.	PROCEEDINGS
1983		
	169	Affidavit of Rodney M. Confer
	170	Affidavit of Rodney M. Confer, w. attchmts.
	171	Pl states' motion to reconsider order of 11-3-83
	172	Federal dfs' motion to review order of 11-3-83, w. attchmts.
Nov 15	173	Fed Dfs' second motion for protective order re pls' interrogs. to Robt. Burford, w. attchmts.
Nov 16	174	Order (DLP) granting fed dfs' motion #162 for time to respond to mot. to remand Copy mailed to counsel of record
Nov 18	175	Amended complaint with request for trial at *Lincoln*, w. certif. of service attch'd
	176	Pls' motion to obtain copies of indices to administrative record, w. aff. of Stephen E. Roady & attchmts.
	177	Pls' motion in CV82-L-443 for protective order re expert witnesses, w. aff. of Stephen E. Roady attch'd.
	178	Pls' motion in CV82-L-443 for continuance of discovery deadline & trial setting
Nov 21	179	Affidavit of Rodney M. Confer, with attchmts.
	180	Federal dfs' certif. of service of response to pls' request for admissions
	181	ETSI's motion for time to respond to motions for partial s.j. filed by pls
Nov 22	182	Memo & Order (DLP) giving pls time to submit applications for fees & expenses and briefs re discovery decided in order of 11-3-83 Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
	183	Pls' motion in CV82-L-443 for time to respond to fed dfs' appeal from order of 11-3-83
	184	Pls' motion (in CV82-L-442) to submit reply brief to federal dfs' response to pls' motion to remand
	185	Pls' motion for time to respond to motion for review
	186	Pls' certif. of service of motions #'s 184 & 185
Nov 23	187	Pls' certif. of service of interrogs. to fed. dfs & requests for production, etc.
Nov 25	188	Pls' certif. of service of third request for production to federal dfs
Nov 28	189	Certif. of service of response of amicus curiae So.Dakota to mots. for s.j.
	190	Order (WKU) granting federal dfs' 11-7-83 motion to file response (#162)
	191	Order (WKU) giving dfs time to file responses to motions of pls for partial S.J. (#181) and pls time to reply Copy of orders #190 & 191 mailed to counsel of record
Nov 29	192	Df ETSI's certificate of service re discovery documents
	193	Opposition of pls in CV82-L-443 to federal dfs' second motion for protective order re interrogatories to Bureau of Land Management
Nov 30	194	Entered Order (DLP) filed 11-29-83 rescheduling conference set for 11-29-83 to 12-5-83 at 1:30 p.m. Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
	195	Order (WKU) giving pls time to respond to motion for review of Magistrate's order of 11-3-83 (#185) Copy mailed to counsel of record
	196	Order (WKU) giving pls leave to submit reply brief to federal dfs' response to pls' motion to remand (#184) Copy mailed to counsel of record
	197	Pls' motion for time to respond to motions for partial s.j. filed by intervening df ETSI
Dec 1	198	Affidavit of Elizabeth M. Osenbaugh, w. attchmts.
	199	Df ETSI's motion to file opposition and reply memoranda
Dec 5	200	ETSI's certificate of service of answers to interrogatories and request for Production
	201	Pls' certificate of service of discovery documents
Dec 6	202	Affidavit of G. Roderic Anderson with exhibits
	203	Affidavit of G. Roderic Anderson
Dec 7	204	Pls' motion to amend Pretrial Order
	205	Affidavit of G. Roderic Anderson with exhibits attached
Dec 8	206	Entered Memorandum and Order (DLP) filed 12-7-83 on Discovery Conference held 12-5-83; granting pls' motion for continuance (#178 & 204) trial set 4-2-84 at 9:00 a.m. subject to disposition of CV80-L-56—exhibit conference set 3-22-84—final Pretrial set 3-22 and/or 3-23-84, with directions; granting in part pls' motion federal dfs provide indices

DATE	NR.	PROCEEDINGS
1983		
		to administrative record (#176); and granting pls' motion for time to respond to motion for partial S.J. (#197) Copy mailed to counsel of record
	207	Df ETSI's motion for reconsideration of 12-5-83 order continuing trial date
	208	Affidavit of Paul G. Doran
	209	Order (DLP) denying ETSI's motion for reconsideration (#207) Copy mailed to counsel of record
Dec 12	210	ETSI's motion for time to plead to amended complaint
Dec 15	211	Memo & Order (DLP) giving ETSI to 12-23-83 to file answers to amended complaint Copy mailed to counsel of record
Dec 19	212	Memo & Order (DLP) re telephone conference 12-14-83 re discovery matter Copy mailed to counsel of record
Dec 23	213	ETSI's answer to Amended Complaint, with attachments
	214	Memorandum and Order (DLP) granting Dfs' motion #141 in part, federal dfs to produce certain documents within 15 days Copy mailed to all counsel of record
Dec 27	215	Reporter's certificate of taking *deposition* of Craig Rupp in behlf. of pls
	216	Federal dfs' answer to amended complaint in CV82-L-442
	217	Federal dfs' answer to amendments & supplements to pls' second amended complaint in CV82-L-443

DATE	NR.	PROCEEDINGS
1983		
Dec 28	218	Memo & Order (DLP) granting pls' motion for reconsideration of magistrate's memo & order of 11-3-83, filing 171, etc. in CV82-L-442 & #164 in 82-L-443; and granting in part motion of pls in CV82-L-443 for partial reconsideration of court's order of 11-3-83, filing #161, etc. & #168 in 82-L-442 and pls in both cases ordered to reimburse dfs for costs in defending this mot including atty's fees Copy mailed to counsel of record
Dec 29	219	ETSI's motion for time to submit reply briefs
Dec 30	220	Order (DLP) granting motion #219
	221	Memo & Order (DLP) granting in part federal dfs' second motion, #173, for protective order re pls' interrogs. to Robert Burford; and federal dfs to reimburse pls for their costs re this motion, etc., and giving parties time to submit applications for expenses, etc. Copies mailed to counsel of record
	222	Federal dfs' appeal from magistrate's Memo & Order of 12-23-83
1984		
Jan 3	223	ETSI's notice of filing responses to railroad's request for documents
	224	Affidavit of Edward J. Wasp, with attachments
Jan 4	225	Federal dfs' certif. of service of response to pl states' 2nd interrogs.
	226	Entered reporter's certif., filed 1-3-84, of *deposition* of Nels Carlson in behalf of pls
	227	Court Reporter's certificate re deposition of *Raymond J. Supalla*

DATE	NR.	PROCEEDINGS
1984		
Jan 6	228	Pls' certificate of service of response to ETSI's req. for production
	229	Court Reporter's certificate re *deposition* of James F. Wiegand
Jan 10	230	Errata sheet for fed. dfs' reply to opposition by pls to fed. dfs' motion to dismiss
	231	Fed. dfs' appeal of magistrate's order (#221 in CV82-L-442 & #202 in 82-L-443)
Jan 11	232	Pl states' motion to file more than 50 interrogs. on df ETSI
	233	Pl states' motion to file more than 50 interrogs. on federal dfs
	234	Pl st. Mo's certif. of service of interrogs. to df ETSI
	235	Pl st. Mo's. certif. of service of interrogs. to federal dfs.
	236	Pl st. Mo's. certif. of service of req. for production to df ETSI
	237	Pl st. Mo's. certif. of service of req. for production to federal dfs.
	238	Pls' request to file cross-appeal of magistrate's order of 12-23-83
	239	Pls' statement of cross-appeal, w. certif. of service attch'd.
	240	Affidavit of Elizabeth M. Osenbaugh in support, with Appendix attached
Jan 16	241	Reporter's certif. of *deposition* of Robert Hallberg
	242	Federal dfs' certif. of service of response to request for production

DATE	NR.	PROCEEDINGS
1984		
	243	Federal dfs' certif. of service of response to 1st request for admission
	244	Federal dfs' certif. of service of response to 3rd request for production
	245	Federal dfs' certif. of service of response to 1st request to Robert Broadbent & Dept. of Interior for production, etc.
	246	ETSI's petition for recovery of costs in defending against pls' mot. for reconsideration, w. affidavit of David J. Hayes attached
Jan 19	247	Court Reporter's certification regarding *deposition* of David L. Watt
	248	Court Reporter's certification regarding *deposition* of George Gurr
Jan 24	249	Entered Order (WKU) filed 1-23-84 granting pls permission to file cross-appeal of memorandum and order of 12-23-83 (# 238) Copy mailed to all counsel of record
	250	Entered federal dfs' motion to modify magistrate's memo & order on disc. conf. filed 1-20-84
Jan 25	251	Df ETSI's notice of filing interrogatories concerning Identification of Witnesses with interrogatories attached
	252	Court Reporter's certificate re *deposition* of Charles Tulloss
Jan 26	253	Court Reporter's certificate re *deposition* of John F. Kennedy
	254	Court Reporter's certificate re *deposition* of Steven Jauron
Jan 27	255	Order (DLP) granting Fed. dfs' motion to modify (#250) and giving dfs 30 additional

DATE	NR.	PROCEEDINGS
1984		
		days to file administrative record with directions
		Copy mailed to counsel of record
Jan 30	256	Pls' motion to compel production with affidavit of Elizabeth M. Osenbaugh in support, affidavit of Elizabeth M. Osenbaugh re attachments, and attachments
	257	Court reporter's letter re *depositions* of David Williams, Bruce Blanchard, Lillian Stone and Terence Martin
Jan 31	258	Motion of pls in CV82-L-443 to compel discovery & for partial reconsideration court's order of 12-28-83, with affidavit of Rodney M. Confer and exhibits att
Feb 1	259	Motion of K.C. So. Railway, Sierra Club, and Ne., Iowa & Rocky Mt. Chapters of Nat'l. Farmers Union for s.j. on need for suppl. environmental impact statement, affidavit of Rodney M. Confer and attachments
	260	Statement of pls in CV82-L-443 concerning material facts to which exists no g issue re motion for s.j.
	261	Federal dfs & ETSI's motion to identify add'l potential witnesses
	262	Federal dfs & ETSI's motion for time to respond to interrogs.
	263	Motion of ETSI to compel discovery from pl in CV82-L-443
Feb 3	264	ETSI's notice of filing objection to interrogs. of pl states
Feb 8		Entered 2 pleadings filed 2-7-84:
	265	Federal dfs' motion for protective order re deposing of Michael J. Clinton and Darrell D. Mach, with affidavits in support

DATE	NR.	PROCEEDINGS
1984		
	266	Memorandum and Order (DLP) denying motion of df ETSI to submit reply memorandum (# 102); denying motion of K.C. So. Railway to file supplemental response (# 113); denying motion for protective order (# 177); granting motion to serve more than 50 interrogatories (# 232); granting motion to serve more 50 interrogatories (# 233); granting petition for costs (# 246) in part; and denying dfs' motion for time (# 262), etc. Copy mailed to all counsel of record
Feb 10	267	Entered Order (DLP), filed 2-9-84, denying w/o prejudice dfs' motion for protective order, # 265 Copy mailed to counsel
Feb 13	268	Memo (DLP) on telephone conference 2-10-84 re pending disagreement concerning scheduling of two depositions
	269	ETSI's notice of filing ans.to interrogs. of pl states
	270	Pl states' objections to ETSI's interrogs. concerning identification of witnesses
Feb 14	271	ETSI's certificate of service of response to States' motion for production
	272	Pls' certificate of service of objections and answers to ETSI's interrogatories concerning identification of witnesses in CV82-L-443
	273	Federal dfs certificate of service re response to joint request for production
	274	Federal dfs' certificate of service of response to pl states' request for production on federal dfs

DATE	NR.	PROCEEDINGS
1984		
Feb 15	275	Pl States' motion to compel production of documents served on January 10, 1984, with affidavit of Curtis F. Thompson and attachments
	276	Certificate of service of pls in CV82-L-443 of notice of depositions
Feb 15	277	Federal dfs' motion to compel pls to designate and produce witnesses & to shorten deposition notice time
	278	Federal dfs' certificate of service of objections to requests for admissions
	279	Federal dfs' certificate of service of response to interrogatories 14-39
Feb 16	280	Memorandum and Order (DLP) denying pls' motion to compel & for partial reconsideration (# 258), etc. Copy mailed to counsel of record
	281	Motion of pls in CV82-L-443 for protective order and for discovery conference
	282	Federal dfs' notice to take depositions
	283	Federal dfs' amended notice to take depositions
	284	Federal dfs' renewed motion for protective order re deposing of Michael J. Clinton and Darrell D. Mach, with attachments
Feb 17	285	Memorandum and Order (DLP) granting motion re additional potential witnesses (# 261) and setting motions conference 2-21-84 at 10:00 a.m. Copy mailed to all counsel of record
	286	Memorandum and Order (DLP) granting motion to compel production (# 256) and setting briefing schedule re sanctions Copy mailed to all counsel of record

DATE	NR.	PROCEEDINGS
1984		
	287	Pl states' motion for protective order re federal dfs' notice of oral deposition and opposition to federal dfs' motion to compel, w. affidavit of G. Roderic Anderson
	288	Order (DLP) granting in part motions to compel # 275 (any appeal to be filed by 2-24-84), to compel pls to designate witnesses & proceed with depositions # 277, for protective orders # 281 and # 287; renewed motion for protective order # 284 take under advisement Copy mailed to counsel
	289	ETSI's notice of filing response to pls' request for interrogatories
Feb 22	290	Federal dfs' response to pls' motion to compel production with attachments
Feb 23	291	Memorandum and Order (DLP) granting in part renewed motion for protective order (# 284) Copy mailed to counsel of record
	292	Affidavit of G. Roderic Anderson with exhibits attached
Feb 24	293	Motion of federal dfs for reconsideration and/or stay of magistrates orders of 2-17 & 21-84
	294	Appeal of magistrate's order of 2-21-84 denying pls' motion for protective order in CV82-L-443
	295	Affidavit of Rodney M. Confer in support, with attachment
Feb 27	296	Order (DLP) denying motion to reconsider order of 2-17-84 (part of # 293)
	297	Memorandum and Order (WKU) affirming Magistrate's order of 11-3-83 as modified and

DATE	NR.	PROCEEDINGS
1984		
		otherwise denying appeal (# 172); and seting briefing schedule re sanctions Copy of 296 & 297 mailed to counsel of record
	298	Federal dfs' motion for protective order
Feb 28	299	Affidavit of G. Roderic Anderson and attachments in support of motion for s.j.
	300	Motion of pls in CV82-L-443 to compel deposition discovery and for sanctions
Feb 29	301	Federal dfs' response to pls' interrogatories Nos. 14-39
	302	Pl states' motion to compel answers to interrogatories Nos. 25-26 by federal dfs
	303	Pls' motion to compel responses to request for production from federal dfs with affidavit of Rodney M. Confer and attachments including copies of *deposition* of Steve Rothe and Duane Sveum
	304	Pls K.C. Southern Railway, Nebraska-Iowa-Rocky Mountain Farmers Union, and Sierra Club's appeal from magistrate's order re responses from ETSI to interrogatories on economic feasibility issue
Mar 1	305	Federal dfs' response to pls' supplemental motion for summary judgment
Mar 2	306	ETSI's notice of filing responses to pls' request for admissions in CV82-L-443
	307	ETSI's notice of filing response to pls' joint request for production
	308	Entered Memo & Order (WKU), filed 3-1-84, denying federal dfs' appeal of magistrate's order, #222, and pl states' cross-appeal of that same order, #'s 238 & 239 Copy mailed to counsel

DATE	NR.	PROCEEDINGS
1984		
Mar 2	309	Reporter's notice of taking deposition of *Steve Rothe* in behalf of pl St. of Mo.
	310	Reporter's notice of taking deposition of *Larry Hesse* in behalf of pl K.C. So
	311	Reporter's notice of taking deposition of *Laverne Horihan* in behalf of pl K.C. So
	312	Reporter's notice of taking deposition of *Ralph Miller* in behalf of St. of Mo.
	313	Reporter's notice of taking deposition of *Thomas Aude* in behalf of pl St. of Mo.
Mar 5	314	Pl states' motion for reconsideration of magistrate's memo & order of 2-23-84
	315	Affidavit of G. Roderic Anderson re federal dfs' response to 1st request for admission, with attachment
	316	Pl State of Iowa's application for expenses re motion to compel. # 256
	317	Affidavit of Elizabeth M. Osenbaugh in support
	318	Dfs' notice of service of interrogatories (to pl states) & response to requests for admissions
Mar 6	319	Pl State of Missouri's responses to federal dfs' interrogatories
	320	Pl States' motion to compel ETSI to answer interrogatories nos. 17, 29, 35, 37, 38, 39 & 40, with attachments including affidavits of Curtis F. Thompson and copy of *deposition* of Donald J. Miller
	321	Federal dfs' supplemental materials in support of motion for protective order with affidavits of Robert F. Burford and Garrey E. Carruthers attached

DATE	NR.	PROCEEDINGS
1984		
Mar 7	322	Memo (WKU)
	323	Order (WKU) granting to extent federal dfs' and ETSI's motions to dismiss, #'s 73 and 97, and directing clerk to file certain documents in accordance with memo
	324	Documents filed in accordance with memo
	325	Memo & Order (WKU) denying federal dfs' appeal of magistrate's order of 12-30-83, # 231
	326	Memo & Order (WKU) denying pls' appeal of magistrate's order of 2-21-84, # 294 Copies of #'s 322, 323, 325 and 326 mailed to counsel
Mar 8	327	Pl State of Missouri's answer to interrogatory no. 12
Mar 9	328	Federal dfs' amended response to pl States' request for admissions no. 27
Mar 12	329	Entered Memorandum and Order (WKU) filed 3-9-84, affirming magistrate's order of 11-3-83 re imposition of fees and costs Copy mailed to all counsel of record
	330	Federal dfs' supplemental response to pl states' request for production, with attachments
	331	Motion of ETSI for withdrawal of counsel William Lisenbard
Mar 13	332	Affidavit of John W. Robinson re his deposition
	333	Affidavit of Donald Rex Hammer re his deposition
	334	Affidavit of William Samuel Masters re his deposition

DATE	NR.	PROCEEDINGS
1984		
	335	Affidavit of Richard Bryan Pershall re his deposition
	336	Affidavit of Norman Stucky re his deposition
Mar 14	337	Entered Federal Dfs' notice of filing of administrative record & certifying affidavits, filed 3-12-84
	338	Certificate of service of motion of M. J. Bruckner to withdraw William Linsenbard as counsel
	339	Entered Federal Dfs' amended response to Pls' Interrogatories 14-39, filed 3-12-84
	340	Entered Federal Dfs' supplemental response to Pls' joint request for production, filed 3-12-84
Mar 15	341	Entered Federal Dfs' to Pls' motion to compel production, filed 3-13-84
Mar 15	342	Affidavit of G. Roderic Anderson with attachments in support of pls' motion for summary judgment
Mar 16	343	Entered Order (DLP) filed 3-15-84 giving William Linsenbard leave to withdraw as counsel for ETSI (#331) Copy mailed to all counsel of record
	344	Memorandum and Order (WKU) denying appeal of Magistrate's order (#304) Copy mailed to all counsel of record
Mar 19	345	*Deposition* of Avtar Singh Sandhu taken on behalf of K.C. Southern Railway, filed at direction of Magistrate
	346	*Deposition* of William Bernard Harris taken on behalf of K.C. Southern Railway, filed at direction of Magistrate

DATE	NR.	PROCEEDINGS
1984		
	347	*Deposition* of Alan H. Plummer taken on behalf of K.C. Southern Railway, filed at direction of Magistrate
	348	Motion of Kansas City Southern to file amended complaint, or, for reconsideration of order of 3-7-84
	349	Submissions in support
	350	Memorandum and Order (DLP) denying motions to file oppositions (#151 & 199); to file reply brief (#164); to compel (#263, 300 & 303); for protective order (#298) for reconsideration #314); and awarding costs and attorney fees re motion #300, giving ETSI 10 days to file application and pls 10 days to respond Copy mailed to all counsel of record
	351	Affidavit of David J. Hayes with exhibits in support of pending motions of ETSI
	352	Letter certificate of court reporter re *depositions* of Frank Ellis and Lawrence G. Kline
Mar 21	353	ETSI's motion in limine to exclude introduction of duplicative testimony, with affidavit of David J. Hayes and *depositions* attached
	354	ETSI's motion in limine to exclude economic testimony offered by pls in 82-L-443 with affidavit of David J. Hayes and attachments
	355	ETSI's motion in limine to exclude evidence related to hypothetical future withdrawals of Missouri River water, with affidavit of David J. Hayes and attachment
	356	ETSI's motion in limine to exclude introduction of undisclosed expert evidence, with affidavit of David J. Hayes and attachments

DATE	NR.	PROCEEDINGS
1984		
	357	ETSI's motion in limine to exclude introduction of legal testimony, with affidavit of David J. Hayes and copy of *depositions* of Ralph W. Johnson and Malcolm F. Baldwin
	358	Affidavit of David J. Hayes re States' motion to reconsider magistrate's order 2-23-84, with attachments
Mar 22	359	Affidavit of Curtis F. Thompson re motion to compel answers to interrogatories df ETSI
Mar 23	360	Pl K. C.'s motion for time to submit costs & fees re court's order of 3-9-84
Mar 26	361	Affidavit of Wayne L. Decker
	362	Submission of original affidavit of Malcolm F. Baldwin
	363	Submission of original affidavits of Dr. Thomas O. Claflin and Thomas P. Ballestero and clearer copy of Affidavit of Thomas S. Carter
Mar 27	364	Order (DLP) giving KCSR to 3-28-84 to submit itemized costs and fees (#360) Copy mailed to counsel of record
Mar 28	365	Entered Memorandum and Order (DLP) filed 3-27-84 denying motion to compel answers to interrogatories (#320) Copy mailed to counsel of record
	366	Aplication of KCSR and Nebraska, Iowa & Rocky Mountain Chapters for expenses re court's order of 3-9-84, with affidavit of Stephen E. Roady in support
	367	Statement of pls in CV82-L-443 of appeal of magistrate's order of 3-19-84, with attachments

DATE	NR.	PROCEEDINGS
1984		
	368	Order (DLP) on pretrial conference held 3-22 and 3-23-84 Copy mailed to all counsel of record
Mar 29	369	Motion of State of Nebraska for time to deliver copies of exhibits to federal dfs with affidavit of G. Roderic Anderson in support
Mar 30	370	ETSI's showing in opposition to KCSR's motion to file amended complaint or for reconsideration, with attachments, including affidavits of Walter A. Hale, Avtar Singh Sandhu and Mary Anne Sullivan
Apr 2	371	Motion of pl States and KCSR for time to respond to ETSI's motion in limine with affidavit of G. Roderic Anderson in support
Apr 3	372	Motion of ETSI for reassignment to another judge, with affidavit of Paul G. Doran attached
	373	Certificate of court reporter re *deposition* of Duane Sveum
	374	Certificate of court reporter re *deposition* of John E. Velehradsky
Apr 4	375	Pls' motion in limine to exclude introduction of undisclosed expert evidence
	376	Pls' submission of affidavit with attachments in supoprt and in resistance to ETSI's motion in limine, no. 356
	377	State of Nebraska's withdrawal of motion for time (#369)
Apr 5	378	Pl States' motion for reconsideration of order denying motion to compel
	379	Affidavit of Thomas C. Sattler in support of pl K.C.'s response re opposition to motion to

DATE	NR.	PROCEEDINGS
1984		
		file amended complaint, etc., with attachments
	380	Affidavit of Mary Anne Sullivan and copy of *deposition* of Malcolm F. Baldwin and his affidavit in support of motion for summary judgment
	381	ETSI's supplemental motion in limine to exclude Malcolm F. Baldwin as a witness
Apr 9	382	Entered Memo & Order (DPL), filed 4-6-84, setting schedule for submitting updated exhibit list, objections to designation of discovery documents, etc.—continuing P.T. to 5-4-84 at 9:00 a.m.
	383	Memo & Order (DLP) granting application of State of Iowa for expenses, etc. re pl states' motion to permit inspection, #316, and federal dfs to reimburse State of Iowa sum of $525—and denying pl states' motion to reconsider order of 3-27-84
	384	Order (WKU) granting pl states & K.C.'s motion for time, #371 Copies mailed to counsel
	385	ETSI's opposition to pls' appeal of magistrate's order of 3-19-84 denying motion to compel
Apr 17	386	Affidavit of David J. Hayes re motion in limine to exclude economic testimony, with attachments
	387	Affidavit of David J. Hayes re motion to exclude undisclosed expert evidence, with attachments
Apr 18	388	Entered Memorandum and Order (DLP) filed 4-17-84 denying motion to compel (#302) Copy mailed to counsel

DATE	NR.	PROCEEDINGS
1984		
Apr 19	389	Affidavit of Eliza Ovrom, Asst. Attorney General, re pl's response to ETSI's motion in limine, with attachments
	390	ETSI's motion to file unauthorized reply re pl states' response to motion for reassignment to another judge, with attachment
Apr 23	391	Memo & Order (DLP) pls to submit to counsel for dfs revised statement of issues Copy mailed to counsel
Apr 26	392	States' request for leave to respond to ETSI's reply re motion in limine to exclude introduction of undisclosed expert evidence
May 3	393	Memorandum and Order (DLP) that pretrial conference set for 5-4-84 is canceled until further order of the Court Counsel called and copy mailed to counsel of record
	394	Motion of Pls in 82-L-443 to strike re Memo of Federal dfs in support of ETSI's motion for reassignment; and for sanctions
	395	Memorandum (WKU)
	396	Judgment (WKU) Permanently Enjoining defendants from performing the "Industrial Water Service Contract Between the United States and ETSI Pipeline Project, a Joint Venture" dated 7-6-82; ETSI's motion for S.J. and joint motions of Federal dfs and ETSI to dismiss denied as to Ct. I (#57) (#73 & 97); States motion for S.J. granted as to Ct I (#143) Copy of Memo & Order mailed to counsel of record
May 7	397	ETSI's motion for leave to serve brief exceeding 10 pages

DATE	NR.	PROCEEDINGS
1984		
May 8	398	KCS's motion to file amended complaint or for reconsideration of order with affidavits in support
May 14	399	Notice of Appeal of df U.S.A. with certificate of service on 5-14-84 Copy delivered to Paula Mahlman, Court Reporter, Room 589 Federal Bldg., 100 Centennial Mall Nort', Lincoln, NE 68508. Tel. (402) 477-7924
May 15	400	ETSI's response to KCS' brief with affidavit of Walter A. Hale in support
	401	ETSI's Notice of Appeal with certificate of service on 5-14-84 Copy delivered to Paula Mahlman, Court Reporter
May 22		Two certified copies of Notice of Appeal of df U.S.A. filed 5-14-84, of ETSI's Notice of Appeal filed 5-15-84, of District Court's Memorandum and Order filed 5-3-84, of KCS's motion to file amended complaint or for reconsideration of order filed 5-8-84, and of all docket entries to date mailed to Clerk, U. S. Court of Appeals. Copy of docket entries mailed to all counsel of record
May 25	402	Copy of Memorandum and Order (WKU) in CV82-L-443 granting in part and denying in part motions of KCSR for reconsideration and for leave to file amended complaint (#348 & 398 in 82-L-442)—reversing decision to dismiss railroad from Count XVII, and vacating earlier decision in regard to railroad on counts II, III, IV, VII, VIII, IX, X, and XVIII Copy mailed to counsel of record Two certified copies of last page of docket entries to date mailed to Court of Appeals

DATE	NR.	PROCEEDINGS
1984		
May 29	403	State of Nebraska's Notice of Cross-Appeal wth certificate of service on 5-29-84
	404	State of Iowa's Notice of Cross-Appeal with certificate of service on 5-29-84
	405	State of Missouri's Notice of Cross-Appeal with certificate of service on 5-29-84 Copy of filings 403, 404, & 405 delivered to Paula Mahlman, Court Reporter
Jun 4		Two certified copies of Notices of Cross-Appeal of State of Nebraska, State of Iowa, and State of Missouri filed 5-29-84, of District Court's Memoranda and Orders filed 3-7-84 and 5-25-84, and of all docket entries to date mailed to Clerk, U. S. Court of Appeals. Copy of last page of docket entries mailed to all counsel of record in CV82-L-442 and CV82-L-443
	406	Motion of Farmers Union for costs, attorneys' fees and expenses
Jun 5	407	Federal Df's designation of record joining ETSI's *joint appendix*
June 14	408	Court Reporter's certification regarding *deposition* of William L. Baxter
	409	Court Reporter's certification regarding *deposition* of James J. Carney
June 15	410	Amended notice of appeal by federal defendants with certificate of service on 6-15-84
Jun 18		Two certified copies of Amended notice of appeal by federal defendants and of last page of docket entries mailed to Court of Appeals
Jun 18	411	Federal defendants' amended designation of record

DATE	NR.	PROCEEDINGS
1984		
	412	Federal defendants' amended designation of record Copy mailed to Court of Appeals with 2 certified copies of last page of docket entries
Jun 20	413	KCSR's motion for certification of 3-7-84 and 5-25-84 decisions for immediate appeal; and for entry of final judgment as to certain parts with affidavit in support and exhibits attached
Jun 25	414	Affidavit of John Stencel in support of the motion for fees and expenses of Farmers Union Two certified copies of last page of docket entries mailed to Court of Appeals
Jun 27	415	States' motion for certification of 3-7-84 decision as modified 5-25-84 for immediate appeal pursuant to 28 USC 1292(b)
	416	Affidavit in support with attachments
Jul 10	417	ETSI's response to motions for certification with affidavit attached
Jul 19	418	Affidavit of Eliza Ovrum in support of States' reply to Fed. Dfs' response to pls motion for certification with attachments
Jul 23	419	Federal dfs' motion for access to administrative record
Jul 27	420	Memo & Order (WKU) granting ETSI's motions to submit briefs exceeding ten pages (#397), railroad's motion for certification under 28 USC 1292(b) (#413); granting in part and denying in part States' motion for certification (#415); denying railroad's motion for entry of final judgment (#413); denying as moot States' motion for leave to

DATE	NR.	PROCEEDINGS
1984		
		respond to ETSI's reply brief (#392), and motions to file reply briefs (#'s 390 & 392); and reserving ruling on motions of Sierra Club and Farmers Union chapters for attorneys' fees & costs (#406) pending determination of appeal of permanent injunction Copy mailed to counsel Two certified copies mailed to Michael Gans, Court of Appeals, with two certified copies of last page of docket entries to date
Aug 16	421	Entered Order (WKU) filed 8-15-84 granting Corps of Engineers access to Administrative Records (#419)
	422	Memorandum and Order (WKU) that U.S. shall pay pls KCSR and the Nebraska, Iowa & Rocky Mt. Farmers Union Chapters $1,000 and the pl State of Iowa $1,130 in expenses, including atty's fees (#366) Copy of filings 421 & 422 mailed to counsel of record
Oct 15	423	Copy of Order for Remand, U. S. Court of Appeals, to district court for consideration and determination of mootness, and retaining jurisdiction over appeals 84-1674 and 84-1675 pending determination, and directing order relating to mootness and any underlying record be certified to Circuit Court
Oct 17	424	Pls' submission of filings from Court of Appeals for consideration on issue of mootness and statement of intention to submit plan for limited discovery with affidavit of Rodney M. Confer attached and other attachments
Oct 18	425	Pls' supplemental submission of filings from Court of Appeals with attachments and affidavit of Rodney M. Confer attached

DATE	NR.	PROCEEDINGS
1984		
Oct 29	426	Pls' motion for leave to conduct limited discovery on issues of mootness & rip
Nov 2	427	Federal dfs' motion for time to respond to pls' motion to conduct limited disc
Nov 6	428	Order (WKU) granting federal dfs' motion #427 Copy mailed to counsel
Dec 5	429	Federal dfs' response to pls' motion to conduct limited discovery
Dec 10	430	Pls' motion to deny participation of amici, or, for time to submit brief
Dec 21	431	Order (WKU) denying motion to conduct discovery (#426); granting motion to deny participation of amici (#430); and setting evidentiary hearing on issue of mootness 12-28-84 at 9:00 a.m. Copy mailed to counsel
Dec 28	432	Courtroom Minutes—evidentiary hearing on issue of mootness—before Judge Urbom—oral argument set for 2-11-85 at 12:00 p.m.
	433	List of witnesses
	434	List of exhibits
1985		
Feb 6	435	Certif. of service of State of So. Dakota of memo in opposition to pls' motion to dismiss
Feb 7	436	Pls' motion to submit brief in excess of 10 pages on issue of mootness
	437	Affidavits of Eliza Ovrom and attachments including copy of *deposition* of Paul Doran on issue of mootness

DATE	NR.	PROCEEDINGS
1985		
Feb 8	438	Affidavits of M. J. Bruckner and Paul Doran re opposition of ETSI to motion to dismiss appeal as moot, with copy of *deposition* of Paul Doran and attachments
Feb 11	439	Order (WKU) giving Pls leave to submit brief in excess of 10 pages (#436) Copy delivered & mailed to counsel of record
	440	*Courtroom minutes*—hearing on issue of mootness—submitted
Feb 13	441	Entered Memorandum & Order (WKU), filed 2-12-85, that action is not moot Copy mailed to counsel of record and certified copy to Court of Appeals
Feb 28	442	Reporter's transcript of evidentiary hearing on 12-28-84
	443	Reporter's transcript of arguments on issue of mootness on 2-11-85
May 13	444	Copy of Order, U. S. Court of Appeals, Eighth Circuit, granting petitions for permission to appeal under 28 U.S.C. 1292(b) by KCSR, State of Iowa, Missouri, and Nebraska
Jul 25	445	Certified copy of Judgment, U. S. Court of Appeals, with copy of opinion attached, affirming District Court Judgment, with Appellees/Cross-appellants, States of Nebraska, Iowa, and Missouri to recover sum of $285.00 costs
	446	Certified copy of modification of opinion to include disposition in CV82-L-443 Copy of filings 445 & 446 mailed to counsel
Dec 17	447	Notice by Supreme Court of the U.S. of filing petition for certiorari
1987		
Mar 9	448	Notice of U.S. Supreme Court of filing petition for certiorari

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 82-L-443

KANSAS CITY SOUTHERN RAILWAY COMPANY, *et al.*,
Plaintiffs

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1982		
Aug 18	1	Complaint with request for injunctive, mandatory and declaratory relief, and request for place of trial at *Lincoln.*
	2	Plaintiffs' motion for consolidation of CV82-L-443 and CV82-L-442.
	3	Plaintiffs' motion for temporary waiver of resident counsel. Summons issued to Federal defendants and to Energy Transportation Systems—to Marshal.
Aug 23	4	Entered Order (WKU), filed 8-20-82, granting plaintiffs' motion # 3 for temporary waiver of resident counsel requirement, and giving them 60 days to comply with requirements re obtaining of resident counsel Copy mailed to counsel of record
Sep 3	5	Summons with returns

DATE	NR.	PROCEEDINGS
1982		
	6	Return of summons on defendant Sisinyak
	7	Return of summons on defendant Andrews
	8	Summons with return
Sep 8	9	Defendant Energy Transportation's motion for time to plead
	10	Order (WKU) giving defendant ETSI to 10-18-82 to plead, or until time federal defendants plead Copy mailed to counsel of record
Sep 13	11	Defendant Energy Transportation's motion to defer ruling on plaintiffs' motion to consolidate
Sep 28	12	Entry of appearance of Rodney M. Confer as additional counsel for plaintiffs.
	13	Motion of Rodney M. Confer for admission of non-resident attorneys
Oct 1		Entered 4 pleadings filed 9-30-82:
	14	Application and *Order (WKU) admitting Brenda H. Kelley* to practice in this case only. Copy mailed to Brenda H. Kelley and Rodney Confer.
	15	Application and *Order (WKU) admitting Stephen E. Roady* to practice in this case only. Copy mailed to Stephen E. Roady and Rodney Confer.
	16	Application and *Order (WKU) admitting William B. Bonvillian* to practice in this case only. Copy mailed to William Bonvillian and Rodney Confer.

DATE	NR.	PROCEEDINGS
1982		
	17	Application and *Order (WKU) admitting Jon T. Brown* to practice in this case only. Copy mailed to Jon T. Brown and Rodney Confer.
Oct 1	18	Motion of State of South Dakota to intervene as defendant and request for hearing, with copy of answer attached
	19	Affidavit of William J. Janklow in support, with attachments
	20	Answer of State of South Dakota
	21	South Dakota's motion to file additional motions
Oct 7	22	First Amended Complaint, with request for trial at *Lincoln*
Oct 8	23	Praecipe for issuance of summons on added defendant Anne M. Gorsuch Summons issued-to Marshal
Oct 12	24	Plaintiffs' motion for time to respond to motions filed by State of South Dakota
Oct 14	25	Order (DLP) giving plaintiffs until 10-28-82 to respond to motions of State of South Dakota of 10-1-82 Copy mailed to counsel of record
Oct 15	26	Answer of ETSI to first amended complaint
	27	Answer of Federal defendants to first amended complaint
Oct 20	28	Amended certificate of service of Answer by federal defendants
Oct 21	29	Summons to Anne M. Gorsuch with return.
	30	Federal Defendants' response to motion to consolidate.

DATE	NR.	PROCEEDINGS
1982		
Oct 22	31	Motion of defendant Energy Transportation Systems to dismiss plaintiff Kansas City Southern Railway for lack of standing.
Oct 28	32	Plaintiffs' opposition to intervention by the State of South Dakota
	33	Plaintiffs' opposition to motion of State of South Dakota to file additional motions
Oct 29	34	Application and *Order (WKU) for Daniel J. Doyle to practice* for this case Copy mailed to Mr. Doyle
	35	Application and *Order (WKU) for Curtis Glen Wilson to practice* for this case Copy mailed to Mr. Wilson
	36	Application and *Order (WKU) for Warren R. Neufeld to practice* for this case Copy mailed to Mr. Neufeld
Nov 4	37	Application and *Order (WKU) for Thomas J. Welk* to practice for this case Copy mailed to Mr. Welk
Nov 5	38	Plaintiffs' notice to rely upon facts not appearing of record in opposition to motion to dismiss, and motion for time to respond to motion to dismiss, with affidavit of Rodney M. Confer attached
	39	Motion of South Dakota to respond to plaintiffs' opposition to SD's motion for intervention
	40	Intervenor SD's request for hearing on motion for intervention
Nov 8	41	Entered Order (DLP) filed 11-5-82 giving State of SD until 11-1-82 to submit reply brief re: motion to intervene Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1982		
Nov 12	42	Order (WKU) granting plaintiffs' motion for time (# 38), giving plaintiffs to 12-1-82 to respond to motion of Defendant Energy Transportation Systems, Inc. to dismiss Kansas City Southern Railway Company as a plaintiff Copy mailed to all counsel of record
	43	Defendant Energy Transportation System's opposition to Kansas City Southern's request for time
Nov 15	44	South Dakota's certificate of service of brief re intervention
Nov 16	45	Plaintiff's opposition to South Dakota's request for hearing to clarify issues
Nov 17	46	Entered Federal Defendants' response to motion of State of So. Dakota to intervene filed 10-15-82.
Nov 18	47	Energy Transportation System's motion for reconsideration
Nov 19	48	Entered Order (WKU), filed 11-18-82, denying motion for reconsideration (# 47); order of November 10 to stand Copy mailed to all counsel of record
Nov 30	49	Entered Order (DLP) filed 11-29-82 granting request of State of SD for oral argument on its motion to intervene but denying request for evidentiary hearing, oral argument set 12-13-82 at 10:30 a.m. Copy mailed to counsel of record
Dec 1	50	Plaintiffs' opposition to motion of ETSI to dismiss KCS for lack of standing
Dec 9	51	Motion of ETSI for continuance of oral argument

DATE	NR.	PROCEEDINGS
1982		
Dec 13	52	Entered Order (DLP), filed 12-10-82, continuing oral argument until 12-20-82 at 3:30 p.m. Copy mailed to counsel of record
Dec 16	53	Motion of Donn E. Davis for admission of William Linsenbard to practice for this case only
	54	Motion of Donn E. Davis for admission of James A. Hourihan, George U. Carneal and David J. Hayes to practice for this case only
Dec 20	55	*Order (DLP) admitting George U. Carneal to practice* for this case only
	56	*Order (DLP) admitting William E. Linsenbard to practice* for this case only
	57	*Order (DLP) admitting James A. Hourihan to practice* for this case only
	58	*Order (DLP) admitting David J. Hayes to practice* for this case only
	59	Courtroom minutes—before Magistrate Piester—hearing on motion to intervene of State of SD (# 18)—submitted Copies #'s 55, 56, 57 & 58 mailed to respective counsel and Attorney Donn Davis
1983		
Jan 13	60	Entered Memorandum and Order (DLP), filed 1-12-83, denying motions of South Dakota to intervene, #18, and to file additional motions, # 21
Jan 24	61	Motion of State of SD to appeal order of Magistrate of 1-12-83
Jan 25	62	Order (WKU) giving State of SD leave to appeal order of Magistrate by 1-25-83

DATE	NR.	PROCEEDINGS
1983		
	63	Appeal by State of SD to order of Magistrate of 1-12-83 Copies of #'s 62 and 63 mailed to counsel of record
Jan 27	64	Appeal by State of SD to order of Magistrate of 1-12-83
	65	Certificate of service
Feb 2	66	Plaintiffs' notice of intent to rely upon facts not established by pleadings
Feb 3	67	Motion of ETSI for judgment on the pleadings, or, for partial summary judgment, with request for oral argument
Feb 14	68	Plaintiffs' notice of intention to rely upon facts not pleadings.
Feb 18	69	Plaintiffs' motion for time to respond to motion of ETSI for judgment on pleadings or partial summary judgment
Feb 24	70	Federal Dfs' motion to dismiss certain counts.
Feb 25	71	Plaintiffs' 1st request for production to Fed. dfs.
	72	Plaintiffs' 1st set of interrogatories to Fed. defs.
Mar 1	73	Notice of State of South Dakota of withdrawal of motion to intervene and appeal from magistrate to court
	74	Motion of State of South Dakota to participate as amicus curiae
	75	Certificate of service of pleadings 73 & 74
Mar 4	76	ETSI's motion for reconsideration of order gr. pls addtl time to respond to motion for judgment on the pleadings or on partial S. J.

DATE	NR.	PROCEEDINGS
1983		
	77	ETSI's request for scheduling conference
Mar 8		Entered 2 pleadings filed 3-7-83:
	78	Order (WKU) granting plaintiffs' motion # 69 for time to respond to ETSI's motion for s.j. etc. Copy mailed to all counsel of record
	79	Order (DLP) giving plaintiffs in CV82-L-442 to 3-11-83 to submit response to motion to consolidate Copy mailed to all counsel of record
	80	Plaintiffs' notice of intention to rely upon facts not appearing of record
	81	Federal defendants' motion for protective order
	82	Federal defendants' motion for conference with the court
Mar 11	83	Plaintiffs' motion for time to respond to Federal Dfs' motion to dismiss certain counts
Mar 14	84	Memorandum and Order (DLP) granting motion # 2, consolidating with CV82-L-442 for trial; granting South Dakota's motion to participate amicus curiae (# 74); setting preliminary conference 4-7-83 at 9:00 a.m. (# 77 & # 82) Copy mailed to all counsel of record
Mar 16	85	Entered Order (WKU) filed 3-15-83 granting plaintiffs' motion for time to respond to Federal dfs' motion to dismiss certain counts (# 83) Copy mailed to all counsel of record
Mar 21	86	Entered Memorandum and Order (DLP), filed 3-18-83, denying motion of federal defs. for protective order, # 81 Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Mar 23		Removed filing # 76 filed in this case in error and placed in proper file.
Mar 25	87	Fed. Dfs' Notice of objection to intention to rely upon facts not established by pleadings.
	88	Fed. Dfs' renewed motion for Protective Order.
Apr 7	89	Memorandum and Order (WKU) denying renewed motion for protective order (# 88) Copy mailed to all counsel of record
Apr 8	90	Appearance of Marti, Dalton law firm for ETSI
Apr 15	91	Memorandum and Order (DLP) on preliminary pretrial held 4-8-83—discovery conference set 6-28-83 at 9:00 a.m. Copy mailed to all counsel of record.
Apr 22	92	Motion of State of North Dakota to appear as Amicus Curiae with affidavit of Allen I. Olson attached
	93	Certificate of Service
Apr 26	94	Notice of federal defs. of service of ans. to interrogs.
Apr 27	95	Certif. of service by St. of So. Dakota
May 2	96	Federal Dfs' motion to limit discovery.
	97	Df Energy Transportation Systems' motion to limit discovery. Federal dfs' certified Index to Administrative Record filed in CV82-L-442.
May 9	98	Pls' response to request of North Dakota to appear as amicus curiae.

DATE	NR.	PROCEEDINGS
1983		
May 11	99	Entered Order (DLP) filed 5-10-83 that State of North Dakota may appear as an Amicus Curiae. Copy mailed to counsel of record.
	100	Plfs.' mot. to compel disc. fm. fed. defs. (orig. filed in CV82-L-442)
	101	Aff. of Stephen E. Roady (orig. filed in CV82-L-442)
May 16	102	Pl's motion for admission of non-resident attorney (Frederick S. Middleton).
May 18	103	Applic. & *Ord. (DLP) admitting Frederick S. Middleton III to practice this case only* Copy mailed to Attys. Middleton & Confer
May 20	104	Motion of ETSI joining Federal Defendants' motion to dismiss
May 23	105	Joint motion of all defendants for oral argument on motions to dismiss
June 2	106	Motion of ETSI for leave to submit reply memo re plfs.' opposition to motion to limit discovery
June 3	107	Plfs.' response to defs.' motion for oral argument
June 6	108	Plfs.' motion for admittance of Ellen M. Mahan to practice for this case only
June 7	109	Application & Order *(WKU) admitting Ellen M. Mahan to practice this case only* Copy mailed to Attys. Mahan & Confer
Jun 10	110	Appl. & *Order (WKU) admitting Mary Anne Sullivan to practice this case only* Copy mailed to Attys. Sullivan & Bruckner
Jun 16	111	Fed. dfs' motion for leave to file reply brief re motion to dismiss.

DATE	NR.	PROCEEDINGS
1983		
Jun 20	112	Order (WKU) giving Fed. dfs. leave to submit reply brief re motion to dismiss (# 111) Copy mailed to all counsel of record
Jun 22	113	Plfs.' joint motion to direct federal defs. to give them timely access to record
Jun 23	114	Entered Order (DLP), filed 6-22-83, denying motion # 113 as moot Copy mailed to counsel of record
Jun 24		Entered 2 pleadings, filed 6-23-83:
	115	Memorandum and Order (DLP) granting in part motions to limit discovery filed by federal defs. & ETSI, filings 96 & 97
	116	Memorandum and Order (DLP) granting in part motion of plfs., # 100, for order compelling ans. to interrogs., with attachment Copies mailed to counsel of record.
Jul 1	117	Entered Memorandum and Order (DLP), filed 6-30-83, on disc. conf. 6-28-83—setting deadlines for filing motions, etc.—sch. final P.T. 1-31-84 at 9:00 a.m.—trial 2-13-84 at 9:00 a.m. as back-up to CV80-L-56 & CV75-L-96 Copy mailed to counsel of record
Jul 8	118	Pls' motion for clarification and reconsideration of 6-23-83 order.
Jul 11	119	Motion of K. C. So. RW to file suppl. resp. & aff. concerning standing
Aug 8	120	Pls' motion to compel answers to interrogatories with affidavit of Stephen Roady
Aug 11	121	Motion of Crosby, Guenzel law firm to withdraw as counsel for df ETSI
	122	Affidavit of Donn E. Davis in support of motion to withdraw

DATE	NR.	PROCEEDINGS
1983		
Aug 19	123	Memorandum & Order (DLP) granting motion for clarification (#118) Copy mailed to counsel of record
Aug 22	124	Federal dfs' mot. for leave to file response to mot. to compel answers to interrogs.
Aug 24	125	Order (DLP) that Crosby, Guenzel law firm may withdraw as counsel for df ETSI Copy mailed to counsel of record (# 121)
Sep 2	126	Order (DLP) giving federal dfs time to file response # 124 Copy mailed to counsel of record
Sep 16	127	Df Energy Transportation Systems' 1st request for production
Sep 20	128	Order (DLP) that federal dfs submit copies of certain documents re discovery within 10 days, etc. Copy mailed to counsel of record
Oct 3	129	Pls' motion to serve more than 50 interrogs. upon df ETSI, w. attachments.
	130	Pls' notice of service of 1st set of interrogs, etc. to ETSI
	131	ETSI's motion for production of documents utilized by pls' experts
Oct 4	132	Pls' motion to compel discovery, w. aff. of Stephen E. Roady & attchmts.
Oct 6	133	Df Energy Transportation Systems' certificate of service re discovery documents
Oct 11	134	Joint motion of federal defendants and Df ETSI for protective order
	135	Pls' motion for admission of non-resident attorney

DATE	NR.	PROCEEDINGS
1983		
Oct 13	136	Entered Application & *Order (WKU) filed 10-12-83 admitting William E. Walters to practice this case only* Copy mailed to attorneys Walters and Confer
Oct 14		Entered 2 pleadings filed 10-13-83:
	137	Memorandum and Order (DLP) granting plaintiffs' motion #120 in part, federal defendants to produce certain documents within 15 days, etc. Copy mailed to all counsel of record
	138	Affidavit of Helena M. Troy in support of ETSI's motion for protective order
	139	Motion of fed. dfs & ETSI to strike pls' submissions as to expert witnesses
	140	Fed. dfs' motion for oral argument re discovery motions
	141	Fed. dfs' motion for leave to submit suppl. memo in support of motion for protective order
Oct 17	142	Pl States' motion in CV82-L-442 for leave to amend complaint with copy attached
	143	Pls' motion in CV82-L-443 for leave to supplement and amend complaint with copy attached
Oct 19	144	Federal dfs' motion to file response to pls' motion to compel in CV82-L-443 out of time
Oct 21	145	Fed. dfs' motion for reconsideration of Magistrate's order of 10-13-83
	146	Memo & Order (DLP) granting pls' motion #129 to serve more than 50 interrogs.; df ETSI's motion, #131, to produce, in part; fed dfs' motion #141 to submit suppl memo

DATE	NR.	PROCEEDINGS
1983		
		in support of motion for protective order; & mot. #144 to submit response to pls' motion to compel out of time, etc. Copy mailed to counsel of record
Oct 28	147	Pls' motion for partial S.J. with statement of material facts attached
	148	Pls' motion to file opposition to dfs' motion to strike submissions as to expert witnesses out of time
Nov 1	149	ETSI's motion for summary judgment
Nov 3	150	Memo & Order (DLP) granting pls' motion to compel discovery, #132; granting dfs' joint motion, #134, for protective order in part, and otherwise denying; and denying federal dfs' motion #140 for oral argument Copy mailed to counsel of record
	151	Attachment to pl states' memo in opposition to dfs' joint motion for protective order, filed at Magistrate's request in Memo & Order, #150
	152	Attachment to brief of pls in CV82-L-443 in opposition to dfs' joint motion for protective order, filed at Magistrate's request, etc.
	153	Attachment to suppl. memo of fed dfs in support of dfs' mot. for protective order filed 10-11-83, filed at Magistrate's request, etc.
Nov 4	154	Pls' submission of affidavit of Rodney M. Confer re dfs' motion to strike pls' submissions as to experts, with attachment
Nov 7	155	Affidavit of Rodney M. Confer, w. attchmts.
	156	Fed dfs' motion for time to respond to motion by pl to remand

DATE	NR.	PROCEEDINGS
1983		
Nov 8	157	Memo & Order (DLP) denying dfs' motion to strike pls' submissions as to expert witnesses, #139, to certain extent w/o prejudice to its renewal, and in all other respects denying said motion Copy mailed to counsel of record
	158	Motion of ETSI for leave to submit reply brief re: dfs' motion to strike pls' submission as to expert witnesses, with attachment
Nov 9	159	K.C. So. Railway, et al's certif. of service of response & objections of pls to ETSI's 2nd req. for production, etc.
	160	Memo & Order (DLP) granting pls' motion #138 in CV82-L-442 to amend complaint and motion #143 to amend complaint, and giving parties to 11-18-83 to file same
Nov 14	161	Pls' motion (in CV82-L-443) for partial reconsideration of court's order of 11-3-83, with Vols 1 & 2 of Final Environmental Impact Stmt. attch'd. (filed in 82-442)
	162	Affidavit of Rodney M. Confer
	163	Affidavit of Rodney M. Confer, w. attchmts.
	164	Pl states' motion to reconsider order of 11-3-83
	165	Federal dfs' motion to review order of 11-3-83, w. attchmts.
Nov 15	166	Fed dfs' second motion for protective order re pls' interrogs. to Robt. Burford, w. attchmts.
Nov 16	167	Order (DLP) granting fed dfs' motion #156 for time to respond to mot. to remand Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Nov 18	168	Second Amended Complaint with request for trial at *Lincoln*, w. certif. of serv. attchd.
	169	Pls' motion (in CV82-L-443) for protective order re expert witnesses, w. aff. of Stephen E. Roady attchd.
	170	Pls' motion (in CV82-L-443) for continuance of discovery deadline & trial setting
Nov 21	171	Affidavit of Rodney M. Confer, w. attchmts.
	172	Federal dfs' certif. of service of response to pls' request for admissions
	173	ETSI's motion for time to respond to motions for partial s.j. filed by pls
Nov 22	174	Memo & Order (DPL) giving pls' time to submit applications for fees, expenses & briefs re discovery decided in order of 11-3-83 (in CV82-L-443)
	175	Pls' motion (in CV82-L-443) for time to respond to fed dfs' appeal from order of 11-3-83
Nov 28	176	Certif. of service of response of amicus curiae So. Dakota to mots. for s.j.
	177	Order (WKU) granting federal dfs' 11-7-83 motion to file response (#156)
	178	Order (WKU) giving dfs time to file responses to motions of pls for partial S.J. (#173) and pls time to reply. Copy of orders #177 & 178 mailed to counsel of record
Nov 29	179	DF ETSI's certificate of service re discovery documents
	180	Opposition of pls to federal dfs' second motion for protective order concerning interrogatories to Bureau of Land Management

DATE	NR.	PROCEEDINGS
1983		
Nov 30	181	Entered Order (DLP) filed 11-29-83, rescheduling conference set for 11-29-83 to 12-5-83 at 1:30 p.m.
	182	Order (WKU) giving pls in CV82-L-442 time to respond to motion for review of Magistrate's order of 11-3-83 Copy of #181 and #182 mailed to counsel of record
	183	Motion of df ETSI for time to respond to motion of pl K. C. Southern Railway for protective order and continuance of trial
Dec 1	184	Df ETSI's motion to file opposition and reply memoranda
Dec 8	185	Entered Memorandum and Order (DLP) filed 12-7-83 on Discovery Conference held 12-5-83; granting pls' motion for continuance (#170) & trial set 4-2-84 at 9:00 a.m. subject to disposition of CV80-L-56—exhibit conference set 3-22-84 at 9:00 a.m.—final Pretrial set 3-22 and/or 3-23-84, with directions; ruling on pls' motion for protective order deferred Copy mailed to counsel of record
	186	Df ETSI's motion for reconsideration of 12-5-83 order continuing trial date
	187	Affidavit of Paul G. Doran
	188	Order (DLP) denying ETSI's motion for reconsideration (#186) Copy mailed to counsel of record
	189	ETSI's certif. of service of ans. to pls' 1st set of interrogs.
Dec 12	190	ETSI's motion for time to plead to amended complaint
	191	ETSI's certificate of service of responses to pls' 1st request for admissions

DATE	NR.	PROCEEDINGS
1983		
Dec 15	192	Memo & Order (DLP) giving ETSI to 12-23-83 to file answers to amended complaint Copy mailed to counsel of record
Dec 19	193	Memo & Order (DLP) re telephone conference 12-14-83 re discovery matter Copy mailed to counsel of record
Dec 23	194	ETSI's answer to second amended complaint, with attachments
	195	Memorandum and Order (DLP) granting dfs motion #145 in part, federal dfs to produce certain documents within 15 days Copy mailed to counsel of record
Dec 27	196	Reporter's certificate of taking *deposition* of Craig Rupp in behlf. of pls
	197	Federal dfs' answer to amended complaint in CV82-L-442
	198	Federal dfs' answer to amendments & supplements to pls' second amended complaint in CV82-L-443
Dec 28	199	Memo & Order (DLP) granting pls' motion for reconsideration of magistrate's memo & order of 11-3-83, filing 171, etc. in CV82-L-442 & #164 in 82-L-443; and granting in part motion of pls in CV82-L-443 for partial reconsideration of court's order of 11-3-83, filing #161 etc., and pls in both cases ordered to reimburse dfs for costs in defending this motion, including atty's fees Copy mailed to counsel of record
Dec 29	200	ETSI's motion for time to submit reply briefs
Dec 30	201	Order (DLP) granting motion #200

DATE	NR.	PROCEEDINGS
1983		
	202	Memo & Order (DLP) granting in part federal dfs' second motion, #166, for protective order re pls' interrogs. to Robert Burford; & federal dfs to reimburse pls for costs re this motion, etc., & giving parties time to submit applic. for expenses Copies mailed to counsel of record
Dec 30	203	Federal dfs' appeal from magistrate's Memo & Order of 12-23-83
1984		
Jan 3	204	ETSI's notice of filing responses to railroad's request for documents
	205	Affidavits of Edward J. Wasp, with attachments
Jan 4	206	Federal dfs' certif. of service of response to pl states' 2nd interrogs.
	207	Entered reporter's certif., filed 1-3-84, of *deposition* of Nels Carlson in behlf. of pls.
	208	Court Reporter's certificate re deposition of Raymond J. Supalla
Jan 6	209	State of MO's certificate of service of response to ETSI's req for production
	210	Court Reporter's certificate re *deposition* of James F. Wiegand
Jan 10	211	Errata sheet for fed. dfs' reply to opposition by pls to fed. dfs' mot. to dismiss
	212	Fed dfs' appeal of magistrate's order of 12-30-83
Jan 11	213	Pl states' motion to file more than 50 interrogs. on df ETSI

DATE	NR.	PROCEEDINGS
1984		
	214	Pl states' motion to file more than 50 interrogs. on fed. dfs
	215	Pl st. Mo's certif. of service of interrogs. to df ETSI
	216	Pl st. Mo's certif. of service of interrogs. to fed. dfs
	217	Pl st. Mo's certif. of service of req. for production to df ETSI
	218	Pl st. Mo's certif. of service of req. for production to fed dfs
	219	Pls' request to file cross-appeal of magistrate's order of 12-23-83
	220	Pls' statement of cross-appeal, w. certif. of service attch'd.
	221	Affidavit of Elizabeth M. Osenbaugh in support, with Appendix attached
Jan 16	222	Reporter's certif. of *deposition* of Robert Hallberg
	223	Federal dfs' certif. of service of response to request for production
	224	Federal dfs' certif. of service of response to 1st request for admission
	225	Federal dfs' certif. of service of response to 3rd request for production
	226	Federal dfs' certif. of service of response to 1st request to Robert Broadbent & Dept. of Interior for production, etc.
	227	ETSI's petition for recovery of costs in defending against pls' mot. for reconsideration, w. affidavit of David J. Hayes attch'd.

DATE	NR.	PROCEEDINGS
1984		
Jan 19	228	Court Reporter's certification regarding *deposition* of David L. Watt
	229	Court Reporter's certification regarding *deposition* of George Gurr
Jan 24	230	Entered Order (WKU) filed 1-23-84 granting pls request #129 to file cross-appeal of memorandum and order of 12-23-83 Copy mailed to all counsel of record
	231	Entered federal dfs' motion to modify magistrate's memo & order on discovery conference 12-7-83, filed 1-20-84
Jan 25	232	Df ETSI's notice of filing interrogatories concerning Identification of Witnesses with interrogatories attached
	233	Court Reporter's certificate re *deposition* of Charles Tulloss
Jan 26	234	Court Reporter's certificate re *deposition* of John F. Kennedy
	235	Court Reporter's certificate re *deposition* of Steven Jauron
Jan 27	236	Order (DLP) granting Fed. dfs' motion to modify (# 231) and giving dfs 30 additional days to file administrative record with directions Copy mailed to counsel of record
Jan 30	237	Court reporter's letter re depositions of David Williams, Bruce Blanchard, Lillian Stone and Terence Martin
Jan 31	238	Motion of pls (in CV82-L-443) to compel discovery & for partial reconsideration of court's order of 12-28-83, with affidavit of Rodney M. Confer and exhibits attch

DATE	NR.	PROCEEDINGS
1984		
Feb 1	239	Motion of K. C. So. Railway, Sierra Club, and Ne., Iowa & Rocky Mt. Chapters of Nat'l. Farmers Union for s.j. on need for suppl. environmental impact statement, affidavit of Rodney M. Confer and attachments
	240	Statement of pls in CV82-L-443 concerning material facts to which exists no genuine issue re motion for s.j.
	241	Federal dfs & ETSI's motion to identify add'l. potential witnesses
	242	Federal dfs & ETSI's motion for time to respond to interrogs.
	243	Motion of ETSI to compel discovery from pl (in CV82-L-443)
Feb 3	244	ETSI's notice of filing objections to interrogs. of pl states
Feb 8		Entered 2 pleadings filed 2-7-84:
	245	Federal dfs' motion for protective order re deposing of Michael J. Clinton and Darrell D. Mach, with affidavits in support
	246	Memorandum and Order (DLP) denying motion of df ETSI to submit reply memorandum (# 106); denying motion of K.C. So. Railway to file supplemental response (# 119); denying motion for protective order (#169); denying ETSI's motion for time (# 183); granting motion to serve more than 50 interrogatories (# 213); granting motion to serve more than 50 interrogatories (# 214); granting petition for costs (# 227) in part; and denying dfs' motion for time (# 242), etc. Copy mailed to all counsel of record

DATE	NR.	PROCEEDINGS
1984		
Feb 10	247	Entered Order (DLP), filed 2-9-84, denying w/o prejudice dfs' motion (#245) for protective order Copy mailed to counsel
Feb 13	248	Memo (DLP) on telephone conference 2-10-84 re pending disagreement concerning scheduling of two depositions Copy mailed to counsel
	249	ETSI's notice of filing answers to interrogs. of pl states
Feb 14	250	ETSI's certificate of service of response to States' motion for production
	251	Pls' certificate of service of objections and answers to ETSI's interrogatories concerning identification of witnesses in CV82-L-443
	252	Fed dfs' certificate of service of response to pl's joint request for production
	253	Federal dfs' certificate of service in response to pl states' request for production on federal dfs
Feb 15	254	Pl states' motion to compel production of documents served 1-10-84, with affidavit of Curtis F. Thompson and attachments
	255	Certificate of service of pls in CV82-L-443 of notice of depositions
Feb 15	256	Federal dfs' motion to compel pls to designate and produce witnesses & to shorten deposition notice time
	257	Federal dfs' certificate of service of response to interrogatories 14-39
Feb 16	258	Memorandum & Order (DLP) denying pls' motion to compel & for partial reconsidera-

DATE	NR.	PROCEEDINGS
1984		
		tion (# 238), pls to reimburse dfs for costs in defending motion, etc. Copy mailed to counsel of record
	259	Pls' motion for protective order and for discovery conference
	260	Federal dfs' notice to take depositions
	261	Federal dfs' amended notice to take depositions
	262	Federal dfs' renewed motion for protective order re deposition of Michael J. Clinton and Darrell D. Mach, with attachments
Feb 17	263	Memorandum and Order (DLP) granting motion re additional witnesses (#241); and setting motions conference 2-21-84 at 10:00 a.m. Copy mailed to all counsel of record
Feb 21	264	Pl states' motion for protective order re federal dfs' notice of oral depositions, and opposition to federal dfs' motion to compel, w. affidavit of G. Roderic Anderson
	265	Order (DLP) granting in part motions to compel #254 (any appeal to be filed by 2-24-84), to compel pls to designate witnesses and proceed with depositions # 256, and for protective orders, #'s 259 & 264; renewed motion for protective order # 262 taken under advisement Copy mailed to counsel
	266	ETSI's notice of filing response to pls' request for interrogatories
Feb 22	267	Federal dfs' response to pls' motion to compel production with attachments

DATE	NR.	PROCEEDINGS
1984		
Feb 23	268	Memorandum and Order (DLP) granting in part renewed motion for protective order (# 262) Copy mailed to counsel of record
Feb 24	269	Appeal of magistrate's order of 2-21-84 denying pls' motion for protective order
	270	Affidavit of Rodney M. Confer in support, with attachment
Feb 27	271	Memorandum and Order (WKU) affirming Magistrate's order of 11-3-83 as modified and otherwise denying appeal (# 165); and setting briefing schedule re sanctions Copy mailed to counsel of record
	272	Federal dfs' motion for protective order
Feb 28	273	Pls' motion to compel deposition discovery and for sanctions
Feb 29	274	Federal dfs' response to pls' interrogatories Nos. 14-39
	275	Pl states' motion to compel answers to interrogatories Nos. 25-26 by federal dfs
	276	Pls' motion to compel responses to joint request for production from federal dfs with affidavit of Rodney M. Confer and attachments including copies of *depositions* of Steve Rothe and Duane Sveum
	277	Pls K.C.Southern Railway, Nebraska-Iowa-Rocky Mountain Farmers Union, and Sierra Club's appeal from magistrate's order re responses from ETSI to interrogatories on economic feasibility issue
Mar 1	278	Federal dfs' response to pls' supplemental motion for summary judgment

DATE	NR.	PROCEEDINGS
1984		
Mar 2	279	ETSI's notice of filing responses to pls' requests for admissions in CV82-L-442
	280	ETSI's notice of filing response to pls' joint request for production
	281	Entered Memo & Order (WKU), filed 3-1-84, denying federal dfs' appeal of magistrate's order, #203, and pl states' cross-appeal of that same order, #'s 219, 220, and 221 and 230 Copy mailed to counsel
	282	Reporter's notice of taking deposition of *Steve Rothe* in behalf of pl St. of Mo.
	283	Reporter's notice of taking deposition of *Larry Hesse* in behalf of pl. K.C.So.Rwy
	284	Reporter's notice of taking deposition of *Laverne Horihan* in behalf of pl K.C. So. Rwy
	285	Reporter's notice of taking deposition of *Ralph Miller* in behalf of pl St.ofNe.
	286	Reporter's notice of taking deposition of *Thomas Aude* in behalf of pl St. of Ne.
Mar 5	287	Df's notice of service of interrogatories & response to requests for admissions to pl states
	288	Pl State of Iowa's application for expenses re motion to compel
	289	Affidavit of Elizabeth M. Osenbaugh in support
Mar 6	290	Pl State of Missouri's responses to federal dfs' interrogatories
	291	Pl State's motion to compel ETSI to answer interrogatories nos. 17, 29, 35, 37, 38, 39 & 40, with attachments including affidavit of Curtis F. Thompson and copy of *deposition* of Donald J. Miller

DATE	NR.	PROCEEDINGS
1984		
	292	Federal dfs' supplemental materials in support of motion for protective order, with affidavits of Robert F. Burford and Garrey E. Carruthers attached
Mar 7	293	Memo (WKU)
	294	Order (WKU) granting ETSI's motion to dismiss Kansas City Southern Railroad as a plaintiff, # 31; granting in part federal dfs' and ETSI's motions to dismiss #'s 70 & 104; and directing clerk to file certain documents in accordance with memo
	295	Documents filed in accordance with memo
	296	Memo & Order (WKU) denying federal dfs' appeal of magistrate's order of 12-30-83, #212
	297	Memo & Order (WKU) denying pls' appeal of magistrate's order of 2-21-84, #269 Copies of #'s 293, 294, 296 and 297 mailed to counsel
Mar 8	298	Pl State of Missouri's answer to interrogatory no. 12
Mar 12	299	Entered Memorandum and Order (WKU) filed 3-9-84, affirming magistrate's order of 11-3-83 re imposition of fees and costs Copy mailed to all counsel of record
	300	Federal dfs' supplemental response to pl states' request for production, with attachments
	301	Motion of ETSI for withdrawal of counsel William Linsenbard
Mar 13	302	Affidavit of John W. Robinson re his deposition

DATE	NR.	PROCEEDINGS
1984		
	303	Affidavit of Donald Rex Hammer re his deposition
	304	Affidavit of William Samuel Masters re his deposition
	305	Affidavit of Richard Bryan Pershall re his deposition
	306	Affidavit of Norman Stucky re his deposition
Mar 14	307	Entered Federal Dfs' notice of filing of administrative record & certifying affidavits, filed 2-12-84
	308	Certificate of service of motion of M. J. Bruckner to withdraw William Linsenbard as counsel
	309	Entered Federal Dfs' amended response to Pls' Interrogatories 14-39, filed 3-12-84
	310	Entered Federal Dfs' supplemental response to pls' joint request for production, filed 3-12-84
Mar 15	311	Entered Federal Dfs' response to Pls' motion to compel production, filed 3-13-84
Mar 16	312	Entered Order (DLP) filed 3-15-84 giving William Lisenbard leave to withdraw as counsel for ETSI (# 301)
	313	Memorandum and Order (WKU) denying appeal of Magistrate's order (#277) Copy of # 312 & # 313 mailed to counsel of record
Mar 19		*Deposition* of Avtar Singh Sandhu taken on behalf of K.C. Southern Railway, filed at direction of Magistrate, in CV82-L-442

DATE	NR.	PROCEEDINGS
1984		
		Deposition of William Bernard Harris taken on behalf of K.C. Southern Railway, filed at direction of Magistrate, in CV82-L-442 *Deposition* of Alan H. Plummer taken on behalf of K.C. Southern Railway, filed at direction of Magistrate, in CV82-L-442
	314	Motion of Kansas City Southern to file amended complaint, or, for reconsideration of order of 3-7-84
	315	Submissions in support
	316	Memorandum and Order (DLP) denying motions to file oppositions (# 148 & 184); to file reply brief (# 158); to defer ruling (#11); to compel (# 243, 273 & 276); for protective order (# 272); and awarding costs and attorney fees re motion # 273, giving ETSI 10 days to file application and pls 10 days to respond Copy mailed to all counsel of record
	317	Affidavit of David J. Hayes with exhibits in support of ETSI's pending motions (exhibits filed in CV82-L-442 only)
	318	Letter certificate of court reporter re *depositions* of Frank Ellis and Lawrence G. Kline.
Mar 21	319	ETSI's motion in limine to exclude introduction of duplicative testimony, with affidavit of David J. Hayes and *depositions* attached
	320	ETSI's motion in limine to exclude economic testimony offered by pls, with affidavit of David J. Hayes and attachments
	321	ETSI's motion in limine to exclude evidence related to hypothetical future withdrawals of Missouri River water, with affidavit of David J. Hayes and attachments

DATE	NR.	PROCEEDINGS
1984		
	322	ETSI's motion in limine to exclude introduction of undisclosed expert evidence, with affidavit of David J. Hayes and attachments
	323	ETSI's motion in limine to exclude introduction of legal testimony, with affidavit of David J. Hayes and copy of *depositions* of Ralph W. Johnson and Malcolm F. Baldwin
	324	Affidavit of David J. Hayes re States' motion to reconsider magistrater's order of 2-23-84, with attachments.
Mar 22	325	Affidavit of Curtis F. Thompson re motion to compel answers to interrogatories on df ETSI
Mar 23	326	Pl K.C.'s motion for time to submit costs & fees re court's order of 3-9-84
Mar 26	327	Affidavit of Wayne L. Decker
	328	Submission of original affidavit of Malcolm F. Baldwin
	329	Submission of original affidavits of Dr. Thomas O. Claflin and Thomas P. Ballestero and clearer copy of affidavit of Thomas S. Carter
Mar 27	330	Order (DLP) giving KCSR to 3-28-84 to submit itemized costs and fees (# 326) Copy mailed to counsel of record
Mar 28	331	Entered Memorandum and Order (DLP) filed 3-27-84 denying motion to compel answers to interrogatories (# 291) Copy mailed to counsel of record
	332	Application of KCSR and Nebraska, Iowa, and Rocky Mountain Chapters for expenses re court's order of 3-9-84, with affidavit of Stephen E. Roady in support
	333	Pls' appeal of magistrate's order of 3-19-84

DATE	NR.	PROCEEDINGS
1984		
	334	Order (DLP) on pretrial conference held 3-22 and 3-23-84 Copy mailed to all counsel of record
Mar 30	335	ETSI's showing in opposition to KCSR's motion to file amended complaint or for reconsideration, with attachments, including affidavits of Walter A. Hale, Avtar Singh Sandhu and Mary Anne Sullivan
Apr 2	336	Motion of Pl States and KCSR for time to respond to ETSI's motion in limine, with affidavit of G. Roderic Anderson in support
Apr 3	337	Motion of ETSI for reassignment to another judge, with affidavit of Paul G. Doran in support
	338	Certificate of court reporter re *deposition* of Duane Sveum
	339	Certificate of court reporter re *deposition* of John E. Velehradsky
Apr 4	340	Pl States and KCSR's motion in limine to exclude introduction of undisclosed expert evidence
	341	Submission of affidavit with attachments in support and in resistance to ETSI's motion in limine, no. 322
Apr 5	342	Pl States' motion for reconsideration of order denying motion to compel
	343	Affidavit of Thomas C. Sattler in support of K.C.'s response re opposition to motion to file amended complaint, etc., with attachments
	344	Affidavit of Mary Anne Sullivan and copy of *deposition* of Malcolm F. Baldwin and his affidavit in support of motion for summary judgment, # 239

DATE	NR.	PROCEEDINGS
1984		
	345	ETSI's supplemental motion in limine to exclude Malcolm F. Baldwin as a witness
Apr 9	346	Entered Memo & Order (DLP), filed 4-6-84, setting schedule for submitting undate exhibit list, etc.—continuing P.T. to 5-5-84 at 9:00 a.m.
	347	Memo & Order (DLP) granting application of State of Iowa for expenses, etc. re pl states' motion to permit inspection, # 288, and federal dfs to reimburse St. of Iowa sum of $525 —denying pl states' motion to reconsider order of 3-27-84, # 342
	348	Order (WKU) granting pl states & K.C.'s motion for time, #336 Copies mailed to counsel
	349	ETSI's opposition to pls' appeal of magistrate's order of 3-19-84 denying motion to compel
Apr 17	350	Affidavit of David J. Hayes re motion in limine to exclude economic testimony, with attachments
	351	Affidavit of David J. Hayes re motion to exclude undisclosed expert evidence, with attachments
Apr 18	352	Entered Memorandum and Order (DLP) filed 4-17-84 denying motion to compel (# 275) Copy mailed to counsel
Apr 19	353	Affidavit of Eliza Ovrom re pls' response to ETSI's motion in limine, w. attchmts.
	354	ETSI's motion to file unauthorized reply re pl states' response to motion for reassignment to another judge, with attachment

DATE	NR.	PROCEEDINGS
1984		
Apr 23	355	Memo & Order (DLP) pls to submit to counsel for dfs revised statement of issues Copy mailed to counsel
Apr 26	356	States' request for leave to respond to ETSI's reply re motion in limine to exclude introduction of undisclosed expert evidence
May 3	357	Memorandum and Order (DLP) that pretrial conference set for 5-4-84 is canceled until further order of the Court Counsel called and copy mailed to counsel of record
	358	Motion of Pls in 82-L-443 to strike re Memo of Federal dfs in support of ETSI's motion for reassignment; and for sanctions
	359	Memorandum (WKU)
	360	Judgment (WKU) Permanently Enjoining defendants from performing the "Industrial Water Service Contract Between the United States and ETSI Pipeline Project, a Joint Venture" dated 7-6-82: ETSI's motion for S.J. and joint motions of Federal dfs and ETSI to dismiss denied as to Ct. III (#67) (#70 & 104); Pls' motion for S.J. granted as to Ct. III (# 147) Copy of Memo & Order mailed to counsel of record
May 7	361	ETSI's motion for leave to serve brief exceeding 10 pages
May 8	362	KCS's motion to file amended complaint or for reconsideration of order with affidavits in support
May 14	363	Notice of Appeal of df U.S.A. with certificate of service on 5-14-84

DATE	NR.	PROCEEDINGS
1984		
		Copy delivered to Paula Mahlman, Court Reporter, Room 489 Federal Bldg., 100 Centennial Mall North, Lincoln, NE 86508. Tel. (402) 577-7924
May 15	364	ETSI's response to KCS' brief with affidavit of Walter A. Hale in support
	365	ETSI's Notice of Appeal with certificate of service on 5-14-84 Copy delivered to Paula Mahlman, Court Reporter
May 22		Two certified copies of Notice of Appeal of df U.S.A. filed 5-14-84, of ETSI's Notice of Appeal filed 5-15-84, of District Court's Memorandum and Order filed 5-3-84, of KCS's motion to file amended complaint or for reconsideration of order filed 5-8-84, and of all docket entries to date mailed to Clerk, U.S. Court of Appeals. Copy of docket entries mailed to all counsel of record
May 25	366	Memorandum and Order (WKU) granting in part and denying in part motions of KCSR for reconsideration and for leave to file amended complaint (#314 & 362)—reversing decision to dismiss railroad from Count XVII, and vacating earlier decision in regard to railroad on counts II, III, IV, VII, VIII, IX, X, and XVIII Copy mailed to counsel of record Two certified copies of last page of docket entries to date mailed to Court of Appeals
Jun 1	367	KCSR's motion to grant its motion for Summary Judgment (#147)
Jun 4	368	Application of Sierra Club and Farmers Union Chapters for attorneys' fees and expenses

DATE	NR.	PROCEEDINGS
1984		
	369	Motion of Farmers Union for costs, attorneys' fees and expenses
Jun 5	370	Federal Dfs' designation of record joining ETSI's *joint appendix*
June 14	371	Court Reporter's certification regarding *deposition* of William L. Baxter
	372	Court Reporter's certification regarding *deposition* of James J. Carney
June 15	373	Amended notice of appeal by federal defendants with certificate of service on 6-15-84
June 18		Two certified copies of Amended notice of appeal by federal defendants and of last page of docket entries mailed to Court of Appeals
Jun 18	374	Federal defendants' amended designation of record
	375	Federal defendants' amended designation of record Copy mailed to Court of Appeals with 2 certified copies of last page of docket entries
Jun 20	376	KCSR's motion for certification of 3-7-84 and 5-25-84 decisions for immediate appeal; and for entry of final judgment as to certain parts with affidavit in support and exhibits attached
Jun 25	377	Affidavit of John Stencel in support of motion of Farmers Union for fees and expenses
	378	Third amended complaint with request for trial at *Lincoln* Two certified copies of last page of docket entries mailed to Court of Appeals

DATE	NR.	PROCEEDINGS
1984		
Jun 27	379	States' motion for certification of 3-7-84 decision as modified 5-25-84 for immediate appeal pursuant to 28 USC 1292(b)
	380	Affidavit in support
Jul 9	381	Df ETSI's motion to strike pls' third amended complaint with attachments
	382	Federal dfs motion to strike pls' third amended complaint
Jul 10	383	ETSI's response to motions for certification with affidavit attached
Jul 19	384	Affidavit of Eliza Ovrom in support of States' reply to Fed. Dfs' response to pls' motion for certification (attachments in CV82-L-442)
Jul 23	385	Federal dfs' motion for access to administrative record
Jul 27	386	Memo & Order (WKU) granting ETSI's motion to submit briefs exceeding ten pages (#361) and railroad's motion for certification under 28 USC 1292(b) (#376); granting in part & denying in part States' motion for certification (#379); denying railroad's motion for s.j. (#367) and for entry of final judgment (#376); denying as moot States' motion for leave to respond to ETSI's reply brief (#356) and motions to file reply briefs (#356); and reserving ruling on motions of Sierra Club and Farmers Union chapters for attorneys' fees & costs (#'s 368 & 369) pending determination of appeal of permanent injunction Copy mailed to counsel Two certified copies mailed to Michael Gans, Court of Appeals, with two certified copies of last page of docket entries to date

DATE	NR.	PROCEEDINGS
1984		
Aug 16	387	Entered Order (WKU) filed 8-15-84 granting Corps of Engineers access to Administrative Record (#385)
	388	Memorandum and Order (WKU) that U.S. shall pay to pls KCSR and the Nebraska, Iowa & Rocky Mt. Farmers Union Chapters $1,000 and the pl State of Iowa $1,130 in expenses, including atty's fees (#332) Copy of filings 387 & 388 mailed to counsel of record
Oct 15	389	Copy of Order for Remand, U.S. Court of Appeals, to district court for consideration and determination of mootness, and retaining jurisdiction over appeals 84-1674 and 84-1675 pending determination, and directing order relating to mootness and any underlying record be certified to Circuit Court
Oct 17	390	Pls' submission of filings from Court of Appeals for consideration on issue of mootness and statement of intention to submit plan for limited discovery with affidavit of Rodney M. Confer attached and other attachments
Oct 18	391	Pls' supplemental submission of filings from Court of Appeals with attachments and affidavit of Rodney M. Confer attached
Oct 29	392	Pls' motion for leave to conduct limited discovery on issues of mootness & ripeness
Nov 2	393	Federal dfs' motion for time to respond to pls' motion to conduct limited discovery
Nov 6	394	Order (WKU) granting federal dfs' motion #393 Copy mailed to counsel

DATE	NR.	PROCEEDINGS
1984		
Dec 5	395	Federal dfs' response to pls' motion to conduct limited discovery
Dec 10	396	Pls' motion to deny participation of amici, or, for time to submit brief
Dec 21	397	Order (WKU) denying mot. to conduct discovery (#392); granting motion to deny participation of amici (#396); and setting evidentiary hearing on issue of mootness 12-28-84 at 9:00 a.m. Copy mailed to counsel
		Courtroom Minutes—on issue of mootness
Dec 28	398	Evidentiary hearing—before Judge Urbom—continuing oral argument on mootness to 2-11-85 at 12:00 p.m.
	399	List of witnesses
	400	List of exhibits
1985		
Feb 6	401	Certif. of service of State of So. Dakota of memo in opposition to pls' motion to dismiss
Feb 7	402	Pls' motion to submit brief in excess of 10 pages on issue of mootness
	403	Affidavit of Eliza Ovrom and attchmts. including copy of *deposition* of Paul Doran on issue of mootness (deposition filed in CV82-L-442)
Feb 8	404	Affidavits of M. J. Bruckner and Paul Doran re opposition of ETSI to motion to dismiss appeal as moot, with copy of *deposition* of Paul Doran & attchmts. (deposition & attchmts. filed in CV82-L-442)
Feb 11	405	Order (WKU) giving Pls leave to submit brief in excess of 10 pages (#402) Copy delivered & mailed to counsel of record

DATE	NR.	PROCEEDINGS
1985		
	406	Courtroom minutes—hearing on issue of mootness—submitted
Feb 13	407	Entered Memorandum & Order (WKU), filed 2-12-85, that action is not moot Copy mailed to counsel of record and certified copy to Court of Appeals
Feb 28		Reporter's transcript of evidentiary hearing on 12-28-84 filed in CV82-L-442 Reporter's transcript of arguments on issue of mootness on 2-11-85 filed in CV82-L-442
Mar 18	408	Entered Affidavit of Rodney M. Confer to supplement record on issue of mootness filed 3-15-85 Two certified copies mailed to U. S. Court of Appeals
May 13	409	Copy of Order, U.S. Court of Appeals, Eighth Circuit, granting petitions for permission to appeal under 28 USC 1292(b) by KCSR, State of Iowa, Missouri, and Nebraska
1986		
Jul 25	410	Certified copy of Judgment, U.S. Court of Appeals, with copy of opinion attached, affirming District Court Judgment, with Appellees/Cross-appellants, States of Nebraska, Iowa, and Missouri to recover sum of $285.00 costs
	411	Certified copy of modification of opinion to include disposition in CV82-L-443 Copy of filings 410 & 411 mailed to counsel
Dec 17	412	Notice by Supreme Court of the U.S. for filing of petition for certiorari
1987		
Mar 9	413	Notice of U.S. Supreme Court of filing petition for certiorari

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1675

THE STATE OF MISSOURI, *et al.*,
Appellees

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellants

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1984	
May 25	DOCKETED appeal.
" "	CERTIFIED copies of notice of appeal, docket entries and order dated May 25, 1984
May 25	*BRIEFING SCHEDULE* Appellant DR 6/4/84; Appellee D.R. 6/14/84; Clerk's Record 6/25/84; Appendix 7/5/84; Transcript 6/25/84; Applnt. Brief 7/5/84; Apple. Brief 8/6/84; with 84-1674
May 29	MOTION of aplnt for expedited briefing schedule w/1674
May 30	ORDER: Aplnts motion for expedited briefing schedule is denied. Clerk is directed to set this cASE FOR ARGUMENT AND SUBMIssion during the Sept. 1984 session of Court in St. Louis, MO w/1674
May 31	APPEARANCE for appellee. (2)
June 4	APPEARANCE for appellee. (3)

DATE	FILINGS—PROCEEDINGS
1984	
" "	APPEARANCE for appellee. (4)
" "	APPEARANCE for appellee. (5)
" "	APPEARANCE for appellee. (6)
" "	APPEARANCE for appellant. (7)
June 5	APPEARANCE for appellee. (8)
June 6	BRIEFING SCHEDULE: DR aplnt/aplee (Fed Govt. ETS) and DR apee/cr. aplnt (states) due 6/14/84, clerk's record 6/25/84 or joint appendix due 7/5/84 tr. due 6/25/84, brief aplnt (Fed/ETS due 7/5/84, brief aplee/cr. aplnt (States) due 8/6/84, brief aplees KCSRwy/Sierra, et al. due 8/6/84, reply brief aplnt/cr. aplee (Fed/ETS) due 8/20/84, reply brief/cr. aplnt (States) due 9/3/84 w/others.
June 7	APPEARANCE for appellee. (9)
June 15	MOTION of aplees for ext. of time to designate record MOTION GRANTED 10 days after aplnt designates. NO EXT. OF BRIEFING SCHEDULE on 6/15/84 w/others
June 15	Appellees Motion regarding record (10) cj
June 15	ORDER: Parties are directed to confer by 6/22/84 and agree upon a form of the record. If they cannot agree, they shall contact the Clerk of the court for assistance in resolving the dispute. Aplnt. shall immediately prepare and file a statement of the issues on appeal in accordance with Fed. R. of Appellate Procedure 10(b)(3). Aplees'. designations of record shall be filed by 6/29/84. w/1674
Jun 18	APPEARANCE for appellee (Sierra Club) (11) vmk
Jun 20	APPEARANCE for appellant. (Energy Trans.) (12) vmk

DATE	FILINGS—PROCEEDINGS
1984	
June 28	LAW CLERK MEMO
July 3	MOTION to file joint deferred appendix MOTION GRANTED—parties to proceed pursuant to Rule 30 (c) on 7/3/84 w/others
July 5	*BRIEF APPELLANT* (ETSI Transportation) w/ser 7/3 7 copies (13)
July 5	*BRIEF AMICUS CURIAE* (State of South Dakota) w/others
" "	APPEARANCE appellee (14)
July 25	TO SCREENING w/1674, 1719, 20, 21 30 min.
July 30	ORDER: The motion of Appellees States of MO, IA and NE to dismiss the appeal of Colonel William R. Andrews, Jr., et al (U.S.) is denied. Briefing Schedule previously established remains in effect. w/1674
Aug. 2	Motion for Extension of Time and Memorandum in Support Thereof w/others
Aug. 3	Notice of Private appellees Kansas City Southern Railway Co., The Sierra Club, & the Iowa and Nebraska Chapters of the Nat'l Farmers Union Concerning Request for Extension of Time w/ others
Aug. 6	Petition for Permission to Appeal Interlocutory Order Certified by District Court w/others
Aug 10	FEDERAL APPELLANTS' response to Appellee States' motion for extension of time w/service w/all nos.
Aug 15	Transferred to September session at St. L w/1674, 1719, 20, 21

DATE	FILINGS—PROCEEDINGS
1984	
Aug 16	ORDER: Motion of Missouri, Iowa, and Nebraska for permission to appeal interlocutory orders certified by the district court and filed on 8/6/84 is denied without prejudice pending consideration of a suggestion of mootness which may be made by the parties in relation to the appeal from an injunction by the district court dated 5/3/84. The motion of Kansas City Southern RR Co. for permission to appeal interlocutory orders is also denied without prejudice for the reason stated above. The motion for ext. of time is granted and the appeals from the injunction of the district court dated 5/3/84 are stricken from the calendar of the Sept. Session of this court. The court requests that any suggestions of mootness of the case and any opposition to such suggestions be promptly filed by interested parties w/all others.
Aug 20	REPLY of federal appellants to petition by states to appeal interlocutory order. (w/all other numbers) cg
Aug 31	Motion to Dismiss ETSI's Appeal w/others
Aug 31	Suggestions of Mootness w/others
Aug 31	States' Memorandum on Mootness and Ripeness w/others
Aug 31	Affidavit of Elizabeth M. Osenbaugh w/others
Aug 31	Appendix to Motion to Dismiss w/others
Aug 31	Motion of Appellees to Dismiss Appeal as Moot or Unripe w/others
Aug 31	Memorandum in Support of Motion to Dismiss as Moot or Unripe
Aug 31	Exhibits to Memorandum w/others

DATE	FILINGS—PROCEEDINGS
1984	
Aug 31	Motion to Dismiss as Moot on Behalf of Appellees w/others
Aug 31	Memorandum in Support of Motion to Dismiss w/others
Sept. 11	Appellant's Motion for Extension of Time to Respond to Appellee's Motion to Dismiss w/1674
Sept. 14	ORDER: appellant's motion for extension of time to respond to appellee motion to dismiss is granted. The response is due to be filed by September 24, 1984.
Sept. 17	RESPONSE of Amicus Curiae State of SD in Opposition to Motion of Plaintiffs-Appellees to Dismiss. w/service. w/84-1674/1719/20/21.
Sept. 25	Appellant's Opposition to the Motions of All Appellees to Dismiss (Justice)
Sept. 25	Appellant's Opposition to the Motions of All Appellees to Dismiss (Energy)
Sept. 28	Response of AMICI Mid-West Electric, North Dakota Water Users, East River Electric, & Nat'l Water Resources Assn. to Appellees Motions to Dismiss
Oct. 12	ORDER: We remand 1674 & 1675 to the district court for determination of whether the action is now moot. We retain jurisdiction. w/others
1985	
Feb. 25	ORDER: This matter is set for arg. on Tues., 4/9/85, at 3:00 p.m. in St. Louis. Arg. will be limited to the issue of mootness. The aplees. States of MO, IA and NE are granted leave to file a single consolidated brief on the issue of mootness. The brief is limited to 30 pages and is due

DATE	FILINGS—PROCEEDINGS
1985	
	3/15/85. Appellees, Kansas City Southern Railway, Sierra Club, and Nebraska, Iowa and Rocky Mountain Chapters of the Nat'l Farmers Union, as well as any other party not named in this order supporting dismissal for mootness, may also file a single, consolidated brief on the issue of mootness. This brief is also due 3/15/85 and limited to 30 pages. Appellants, ETSI and Andrews may each file briefs in opposition. These briefs are due 4/1/85. Each brief is limited to 30 pages. Any other party opposing dismissal may join in these briefs. If the court determines after arg. that these appeals are not moot, a briefing schedule will be entered. The Court will also consider the application for leave to take an interlocutory appeal in Misc. 84-8114. w/others.
July 22	JOINT APPENDIX, VOLS. 1 & 2. w/all numbers
Mar. 18	*BRIEF OF APLEES* (Kansas City RR Co., Sierra, et al) on mootness *BRIEF OF APLEES* (State of Missouri, et al) on mootness *AFFIDAVIT OF ELIZA OVROM*
Mar 19	*Transferred to April Session* in St. Louis
Apr. 1	*BRIEF APPELLANT (ETSI)* on mootness w/ 1674
Apr. 2	*BRIEF APPELLANTS* (U.S.A.) on issue of mootness w/1674
Apr. 9	ARGUED AND SUBMITTED IN ST. LOUIS *ON THE ISSUE OF MOOTNESS ONLY* TO JUDGES BRIGHT, J. R. GIBSON, and FAGG. Ms. Eliza Ovrom (AAG of Iowa) for appellees (who are movants on motion to dismiss); Mr. Fred R. Disheroon (Just. Dept.) for appellants and Mr. James A. Hourihan for appellant (En-

DATE	FILINGS—PROCEEDINGS
1985	
	ergy Transportation Systems) (who are both respondents as to the motion to dimiss on mootness). Rebuttal by Mr. Stephen E. Roady (for private appellees). Recorded. w/84-1674/1719/20/21.
Apr. 12	Received copy of 28(j) correspondence from counsel for appellees/cr. appe appellants (O.K. per L.P.)—TO COURT. w/1676/1719/1720/1721/Misc. 84-8114.rh
Apr. 22	ORDER: Order of the dist. ct. that this appeal is not moot is affirmed Appellees have 30 days to file briefs with this Court and appellants may file reply briefs w/in time provided in FRAP 31. (UNPUBLISHED) (with all numbers)
May 2	RESUBMISSION of Petition for permission to appeal per § 1292 w/1674
May 3	MOTION of (States) to renew petition for permission to appeal w/others
May 9	ORDER: The petition for permission to appeal under 28 U.S.C. § 1292(b) filed by the Kansas City Southern Railway Co., State of Iowa, State of Missouri and State of Nebraska are granted. This group of appeals and cross-appeals are set for argument on Tuesday, August 20, 1985, at 9:00 a.m. in St. Paul, Minnesota. w/others
May 20	MOTION BY APLEE/CR-APLNT (State of MO) for ext. of time to file reply brief, MOTION GRANTED TO & INCL. 5/24/85 on 5/23/85
May 24	*BRIEF APPELLEES* (Kansas City Southern RR, et al) w/ser 5/22 8 copies (15)
May 28	*BRIEF APPELLEES* (States of MO, IA and NE) w/ser 5/24 (1 copy) (16) cm

DATE	FILINGS—PROCEEDINGS
1985	
June 3	MOTION BY APLNT for ext. of time to file reply brief
June 7	On aplnt ETSI's motion, ETSI and Andrew, et al are granted to June 14, 1985 to file reply brief
June 12	*REPLY BRIEF FOR AMICUS CURIAE STATE OF SOUTH DAKOTA* w/1674
June 14	*REPLY BRIEF FOR ENERGY TRANSPORTATION SYSTEMS, INC.* w/ser 6/13 7 copies (17)
July 3	*REPLY BRIEF FOR STATES OF MISSOURI, IOWA AND NEBRASKA*: w/ser 7/1 w/1674, 1719, 1720, 1721
July 29	*BRIEF APPELLEES* (KCSR, et al) (30 c brief) (18) cm
" "	*BRIEF APPELLANT* (ETSI) (30 c brief) (19) cm
" "	*REPLY BRIEF (ETSI)* (30 c brief) (20) cm
" "	*BRIEF APPELLEES (States)* (30 c brief) (21) cm
Aug. 16	NOTIFICATION OF RELATED CASE and filing of original action in the U.S. Supreme Court. (w/84-1674) cg
Aug. 19	Motion for leave to file complaint, complaint & brief in support of motion for leave to file complaint.
Aug. 19	APPENDICES A. B. C & D to motion for leave.
Aug. 19	Received additional citation from counsel for State of Iowa. (to court)
Aug. 20	ARGUED & SUBMITTED TO JUDGES J. GIBSON, BRIGHT AND FAGG IN ST. LOUIS, MO. Fred Disheroon for U.S. parties, James A. Houri-

DATE	FILINGS—PROCEEDINGS
1985	
	han for ETSI Elizabeth Osenbaugh, for State appellees, Stephen Roady, for K.C. RR and Sierra appellees. Mr. Disheroon and Mr. Hourihan on Rebuttal. RECORDED w/all others. (cm)
Aug. 19	Received copy of 28(j) correspondence from counsel for State appellees. (O.K. per L.P.)—rh—TO COURT.
Aug. 27	Motion of counsel for the State of Iowa, requesting leave to cite additional documents after oral argument. Also leave to file a further brief in the matter. rh
Sept. 24	ORDER: The request of the State of Iowa to furnish additional citations granted. All parties may file on or before 9/30/85 a filing not to exceed 3 pages on the citations. Additional argument will not be allowed. (UNPUBLISHED) (w/all numbers) cg
Oct. 1	ETSI's Submission in Response to the Court's Order of Sept. 24, 1985. w/others
Oct. 1	Response of Appellees to Order of Sept. 24, 1985 w/others
Oct. 4	Response of Federal Appellants to the Court's Sept. 24, 1985 Order w/others
Oct. 23	Rec'd Supreme Court Brief of Defendants in Opposition to Motion for Leave to File Complaint and Appendix w/others
Nov. 4	Received Reply Brief in Support of Motion for Leave to File Complaint
1986	
Mar. 13	OPINION BY John R. Gibson PUBLISHED DISSENT by Bright w/all nos.

DATE	FILINGS—PROCEEDINGS
1986	
Mar. 13	JUDGMENT: Judgment of dist ct is affirmed in accord w/opinion. w/all
March 13	ORDER: Opinion filed this date includes the disposition of Case No. 85-1593. The opinion is hereby modified to include case 85-1593. (w/85-1593 and 84/1674/1719/1720/1721) cg
Mar. 25	APPELLEES' BILL OF COSTS. w/service. w/1674. rh. (PRIVATE APPELLEES)
Mar. 25	REQUEST APPELLANTS FOR ENLARGEMENT OF TIME IN WHICH TO FILE PETITION FOR REHEARING. w/service. w/1674. "GRANTED TO 4/28/86 on 3/25/86." rh
Mar. 28	APPELLEES/CROSS APPELLANTS, STATE OF MISSOURI, IOWA AND NEBRASKA BILL OF COSTS w/service. w/1674/1719/1720/1721) rh
Apr. 8	Motion Federal Appellants (Kansas City Southern R.R., Co.) for an extension of time to file Objections to Private Appellees' Bill of Costs. w/service. w/84-1674. rh "MOTION GRANTED TO 4/19/86 on 4/9/86."
Apr. 17	OBJECTION FEDERAL APELLANTS TO BILL OF COSTS OF PRIVATE APPELLEES. w/service. w/1674/et al. rh
Apr. 30	PETITION APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/84-1674/et al. rh
Apr. 28	PETITION APPELLANTS' ENERGY TRANSPORTATION SYSTEMS, INC. FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/et al. rh

DATE	FILINGS—PROCEEDINGS
1986	
Apr. 25	RESPONSE OF PRIVATE APPELLEES TO FEDERAL APPELLANTS' OBJECTION TO BILL OF COSTS. w/1674/et al. rh (RECEIVED)
May 5	ORDER: The bill of costs submitted by appellees Kansas City Southern Railway Company, et al., has been considered by the Court, and is denied. w/1674/1719/1720/1721-NE. rh
May 15	ORDER: Appellees' motion for extension of time to file response to the petitions for rehearing en banc herein is granted. Appellees may have to and including June 2, 1986 to file response. w/1674/1719/1720/1721. rh
May 13	MOTION APPELLEES FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO THE PETITION FOR REHEARING. w/service. w/1674/1719/1720/1721. rh
May 21	AMICUS CURIAE'S RESPONSE TO PETITIONS FOR REHEARING EN BANC. w/service w/1674. rh (RECEIVED). Filed 6/5/86 per directions from the Court. rh
May 30	APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING. w/service. w/1674/1719/1720/1721. rh
June 2	APPELLEES' STATES MISSOURI, IOWA AND NEBRASKA RESPONSE TO PETITION FOR REHEARING. w/service. w/1674/1719/1720/1721. rh
July 25	MANDATE ISSUED. w/others. eh
July 28	RECEIPT FOR MANDATE. w/others. rmh.

DATE	FILINGS—PROCEEDINGS
1986	
July 10	ORDER: APPELLANTS' petitions for rehearing en banc have been considered by the Court and are denied. Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions. Petitions for rehearing by the panel are also denied w/others. eh
July 22	MANDATE ISSUED w/others. eh
Oct 6	RECEIVED NOTIFICATION from Supreme Court that extension of time to file petition for writ of certiorari has been granted to December 7, 1986. eh

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1719

THE STATE OF MISSOURI, *et al.*,
Appellants

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees

RELEVANT DOCKET ENTRIES

DATE	FILINGS--PROCEEDINGS
1984	
June 6	Docketed Case
" "	Certified copies of notice of appeal; docket entries; memorandum on standing issues; order and memorandum order rec'd from Dist. Ct. (1)
June 6	BRIEFING SCHEDULE: DR aplnt/aplee (Fed. Govt. ETS) and DR apee/cr. aplnt (states) due 6/14/84, clerk's record 6/25/84 or joint appendix due 7/5/84 tr. due 6/25/84, brief aplnt (Fed/ETS due 7/5/84, brief aplee/cr. aplnt (States) due 8/6/84, brief aplees KCSRwy/Sierra, et al due 8/6/84, reply brief aplnt/cr. aplee (Fed/ETS) due 8/20/84, reply brief/cr. aplnt (States) due 9/3/84 w/others.
June 15	MOTION of aplees for ext. of time to designate record MOTION GRANTED 10 days after aplnt designates. NO EXT. OF BRIEFING SCHEDULE on 6/15/84 w/others

DATE	FILINGS—PROCEEDINGS
1984	
June 15	APPEARANCE for appellant (2)
June 21	Appearance for federal appellees (3)
July 5	*BRIEF APPELLANT* (ETSI) w/others
July 5	*BRIEF AMICUS CURIAE* (State of South Dakota) w/others
July 10	*BRIEF APPELLANT* (Govt.) w/others
July 25	TO SCREENING w/1674,5, 1720,21 30 min.
Aug. 2	Motion for Extension of Time and Memorandum in Support Thereof w/others
Aug. 3	Notice of Private appellees Kansas City Southern Railway Co., The Sierra Club, & the Iowa and Nebraska Chapters of the Nat'l Farmers Union Concerning Request for Extension of Time w/others
Aug. 6	Petition for Permission to Appeal Interlocutory Order Certified by District Court w/others
Aug 10	FEDERAL APPELLANTS' response to Appellee States' motion for extension of time w/service w/all nos.
Aug 15	Transferred to September session at St. L. w/ 1674,5, 1720,21
Aug. 16	ORDER: Motion of Missouri, Iowa, and Nebraska for permission to appeal interlocutory orders certified by the district court and filed on 8/6/84 is denied without prejudice pending consideration of a suggestion of mootness which may be made by the parties in relation to the appeal from an injunction by the district court dated 5/3/84. The motion of Kansas City Southern RR Co. for permission to appeal interlocutory orders is also denied without prejudice for the reason

DATE	FILINGS—PROCEEDINGS
1984	
	stated above. The motion for ext. of time is granted and the appeals from the injunction of the district court dated 5/3/84 are stricken from the calendar of the Sept. Session of this court. The court requests that any suggestions of mootness of the case and any opposition to such suggestions be promptly filed by interested parties w/all others.
Aug. 20	REPLY of federal appellants to petition by states to appeal interlocutory order. (w/all other numbers) cg
Aug. 31	Motion to Dismiss ETSI's Appeal w/others
Aug. 31	Suggestions of Mootness w/others
Aug. 31	States' Memorandum on Mootness and Ripeness w/others
Aug. 31	Affidavit of Elizabeth M. Osenbaugh w/others
Aug. 31	Appendix to Motion to Dismiss w/others
Aug. 31	Motion of Appellees to Dismiss Appeal as Moot or Unripe w/others
Aug. 31	Memorandum in Support of Motion to Dismiss as Moot or Unripe
Aug. 31	Exhibits to Memorandum w/others
Aug. 31	Motion to Dismiss as Moot on Behalf of Appellees w/others
Aug. 31	Memorandum in Support of Motion to Dismiss w/others
Sept. 17	RESPONSE of Amicus Curiae State of SD in Opposition to Motion of Plaintiffs-Appellees to Dismiss. w/service. w/84-1674/75/1720/21.
Sept. 25	Appellant's Opposition to the Motions of All Appellees to Dismiss

DATE	FILINGS—PROCEEDINGS
1984	
Sept. 25	Appellant's Opposition to the Motions of all Appellees to Dismiss
Sept. 28	Response of Amici Mid-West Electric, North Dakota Water Users, East River Electric, & Nat'l Water Resources Assn. to Appellees Motions to Dismiss w/others
Oct. 12	ORDER: We remand 1674 & 1675 to the district court for determination of whether the action is now moot. We retain jurisdiction. w/others (unpub)
1985	
Feb. 25	ORDER: This matter is set for arg. on Tues., 4/9/85, at 3:00 p.m. in St. Louis. Arg. will be limited to the issue of mootness. The aplees. States of MO, IA and NE are granted leave to file a single consolidated brief on the issue of mootness. The brief is limited to 30 pages and is due 3/15/85. Appellees, Kansas City Southern Railway, Sierra Club, and Nebraska, Iowa and Rocky Mountain Chapters of the Nat'l Farmers Union, as well as any other party not named in this order supporting dismissal for mootness, may also file a single, consolidated brief on the issue of mootness. This brief is also due 3/15/85 and limited to 30 pages. Appellants, ETSI and Andrews may each file briefs in opposition. These briefs are due 4/1/85. Each brief is limited to 30 pages. Any other party opposing dismissal may join in these briefs. If the court determines after arg. that these appeals are not moot, a briefing schedule will be entered. The Court will also consider the application for leave to take an interlocutory appeal in Misc. 84-8114. w/others
Mar. 18	*BRIEF OF APPELLEES* (Kansas City RR Co. Sierra, et al) on mootness

DATE	FILINGS—PROCEEDINGS
1985	
" "	*BRIEF OF APLEES* (State of Missouri, et al) on mootness
" "	*AFFIDAVIT of ELIZA Ovrom*
Mar 19	*Transferred to April Session* in St. Louis. w/ others
Apr. 9	ARGUED AND SUBMITTED IN ST. LOUIS *ON THE ISSUE OF MOOTNESS ONLY* TO JUDGES BRIGHT, J. R. GIBSON, and FAGG. Ms. Eliza Ovrom (AAG of Iowa) for appellees (who are movants on motion to dismiss); Mr. Fred R. Disheroon (Just. Dept.) for appellants and Mr. James A. Hourihan for appellant (Energy Transportation Systems) (who are both respondents as to the motion to dismiss on mootness). Rebuttal by Mr. Stephen E. Roady (for private appellees). Recorded. w/84-1674/75/1720/21.
Apr. 12	Received copy of 28(j) correspondence from counsel for appellees/cr. appellants. (O.K. per L.P.)—TO COURT. w/1675/1676/1720/1721/Misc. 84-8114. rh
Apr. 22	ORDER: Order of the dist. ct. that this appeal is not moot is affirmed. Appellees have 30 days to file briefs with this Court and appellants may file reply briefs w/in time provided in FRAP 31. (UNPUBLISHED) (with all numbers)
May 3	MOTION of (States) to renew petition for permission to appeal w/others
May 9	ORDER: The petition for permission to appeal under 28 U.S.C. § 1292(b) filed by the Kansas City Southern Railway Co., State of Iowa, State of Missouri and State of Nebraska are granted. This group of appeals and cross-appeals are set for argument on Tuesday, August 20, 1985, at 9:00 a.m. in St. Paul, Minnesota. w/others

DATE	FILINGS—PROCEEDINGS
1985	
May 20	MOTION BY APLEE/CR-APLNT (State of MO) for ext. of time to file reply brief, MOTION GRANTED TO & INCL. 5/24/85 on 5/23/85
May 28	*BRIEF APPELLEES* (State of MO, IA and NE) w/84-1674/1720/1721
June 7	On aplnt ETSI's motion, ETSI and Andrew, et al are granted to June 14, 1985 to file their reply brief.
June 3	MOTION BY APLNT TO FILE REPLY Brief
June 17	*REPLY BRIEF OF FEDERAL APPELLANTS* w/1674/1720/1721
June 14	*REPLY BRIEF FOR ENERGY TRANSPORTATION SYSTEMS, INC.* w/1675/1719/1720/1721
July 3	*REPLY BRIEF FOR STATES OF MISSOURI, IOWA AND NEBRASKA*: w/ser 7/1 w/1674, 1675, 1720, 1721
July 22	JOINT APPENDIX, VOLS. 1 & 2. w/all numbers
Aug. 16	NOTIFICATION OF RELATED CASE and filing of original action in the U.S. Supreme Court. w/ 84-1674) cg
Aug. 19	Motion for leave to file complaint, complaint & brief in support of motion for leave to file complaint. cg
Aug. 19	APPENDICES A. B. C & D to motion for leave. cg
Aug. 19	Received additional citation from counsel for State of Iowa. cg
Aug. 20	ARGUED & SUBMITTED TO JUDGES J. GIBSON, BRIGHT, AND FAGG IN ST. LOUIS, MO. Fred Disheroon for U.S. parties, James A. Hourihan for ETSI, Elizabeth Osenbaugh, for State ap-

DATE	FILINGS—PROCEEDINGS
1985	
	pellees, Stephen Roady, for K.C. RR and Sierra appellees. Mr. Disheroon and Mr. Hourihan on Rebuttal. RECORDED w/all others. (cm)
Aug. 19	Received copy of 28(j) correspondence from counsel for State appellees. (O.K. per L.P.)—rh —TO COURT
Aug. 27	Motion of counsel for the State of Iowa, requesting leave to cite additional documents after oral argument. Also leave to file a further brief in the matter. rh.
Sept. 24	ORDER: The request of the State of Iowa to furnish additional citations granted. All parties may file on or before 9/30/85 a filing not to exceed 3 pages on the citations. Additional argument will not be allowed. (UNPUBLISHED) (w/all numbers) cg
Oct. 1	ETSI's Submission in Response to the Court's Order of Sept. 24, 1985. w/others
Oct. 1	Response of Appellees to Order of Sept. 24, 1985 w/others
Oct. 4	Response of Federal Appellants to the Court's Sept. 24, 1985 Order w/others
Oct. 23	Rec'd Supreme Court Brief of Defendants in Opposition to Motion for Leave to File Complaint and Appendix w/others
Nov 4	Received Reply Brief in Support of Motion for Leave to File Complaint
1986	
Mar. 13	OPINION BY John R. Gibson PUBLISHED DISSENT by Bright w/all nos. 787 F2d 270 86
Mar. 13	JUDGMENT: Judgment of dist ct is affirmed in accord w/opinion. w/all

DATE	FILINGS—PROCEEDINGS
1986	
March 13	ORDER: Opinion filed this date includes the disposition of case No. 85-1593. The opinion is hereby modified to include case 85-1593. (w case no. 85-1593/84-1674/1675/1720/1721) cg
Mar. 28	APPELLEES/CROSS APPELLANTS, STATE OF MISSOURI, IOWA AND NEBRASKA, BILL OF COSTS. w/service. w/1674/1675/1720/1721. rh
Apr. 25	RESPONSE OF PRIVATE APPELLEES TO FEDERAL APPELLANT'S OBJECTION TO BILL OF COSTS. w/service. w/1674/1675/1720/1721. (RECEIVED) rh
Apr. 28	PETITION APPELLANTS' ENERGY TRANSPORTATION SYSTEMS, INC., FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/1675/1720/1721. (RECEIVED) rh.
Apr. 30	PETITION APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/1675/1720/1721. rh
May 5	ORDER: The bill of costs submitted by appellees Kansas City Southern Railway company, et al., has been considered by the Court, and is denied. w/1674/1675/1720/1721-NE. rh.
May 15	ORDER: Appellees' motion for extension of time to file response to the petitions for rehearing en banc filed herein is granted. Appellees may have to and including June 2, 1986 to file response. w/1674/1675/1720/1721. rh.
May 13	MOTION APPELLEES FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO THE PETITION FOR REHEARING. w/service. w/1674/1675/1720/1721. rh

DATE	FILINGS—PROCEEDINGS
1986	
May 30	APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING. w/service. w/ 1674/1675/1720/1721. rh.
June 2	APPELLEE'S STATES, MISSOURI, IOWA AND NEBRASKA RESPONSE TO PETITION FOR REHEARING EN BANC. w/service. w/ 1674/1675/1720/1721 rh
July 10	ORDER: APPELLANTS' petitions for rehearing en banc have been considered by the Court and are denied. Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions. Petitions for rehearing by the panel are also denied. w/others eh
July 22	MANDATE ISSUED w/others eh
July 28	RECEIPT FOR MANDATE. w/others. rmh

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1720

THE STATE OF MISSOURI, *et al.*,
Appellants

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1984	
June 6	DOCKETED Cross appeal
" "	Certified copies of notice of cross appeal; docket entries; and orders rec'd from District Court. (1)
June 6	BRIEFING SCHEDULE: DR aplnt/aplee (Fed. Govt (ETS) and DR apee/cr. aplnt (states) due 6/14/84, clerk's record 6/25/84 or joint appendix due 7/5/84 tr. due 6/25/84, brief aplnt (Fed/ETS due 7/5/84, brief applee/cr. aplnt (States) due 8/6/84, brief aplees KCSRwy/Sierra, et al due 8/6/84, reply brief aplnt /cr. aplee (Fed/ETS) due 8/20/84, reply brief/cr. aplnt (States) due 9/3/84 w/others.
June 15	MOTION of aplees for ext. of time to designate record MOTION GRANTED 10 days after aplnt designates. NO EXT. OF BRIEFING SCHEDULE on 6 '5/84 w/others.
June 15	APPEARANCE for appellant.

DATE	FILINGS—PROCEEDINGS
1984	
June 18	Appearance for appellee
June 21	Appearance for federal appellees
July 5	*BRIEF APPELLANT* (ETSI) 7 copies w/others
July 5	*BRIEF AMICUS* (State of South Dakota) w/ others
July 10	*BRIEF APPELLANT* (Govt.) w/others
July 25	TO SCREENING w/1674,5,1719,21 30 min
Aug. 2	Motion for Extension of Time and Memorandum in Support Thereof w/others
Aug. 3	Notice of Private appellees Kansas City Southern Railway Co., The Sierra Club, & the Iowa and Nebraska Chapters of the Nat'l Farmers Union Concerning Request for Extension of Time w/ others
Aug. 6	Petition for Permission to Appeal Interlocutory Order Certified by District Court w/others
Aug. 10	FEDERAL APPELLANTS' response to Appellee States' motion for extension of time w/service w/all nos.
Aug 15	Transferred to September session at St. Louis w/1674,5,1719,21
Aug. 16	ORDER: Motion of Missouri, Iowa, and Nebraska for permission to appeal interlocutory orders certified by the district court and filed on 8/6/84 is denied without prejudice pending consideration of a suggestion of mootness which may be made by the parties in relation to the appeal from an injunction by the district court dated 5/3/84. The motion of Kansas City Southern RR Co. for permission to appeal interlocutory orders is also denied without prejudice for the reason stated above. The motion for ext. of time

DATE	FILINGS—PROCEEDINGS
1984	
	is granted and the appeals from the injunction of the district court dated 5/3/84 are stricken from the calendar of the Sept. Session of this court. The court requests that any suggestions of mootness of the case and any opposition to such suggestions be promptly filed by interested parties w/all others.
Aug. 20	REPLY of federal appellants to petition by states to appeal interlocutory order. (w/all other numbers) cg
Aug. 31	Motion to Dismiss ETSI's Appeal w/others
Aug. 31	Suggestions of Mootness w/others
Aug. 31	States' Memorandum on Mootness and Ripeness w/others
Aug. 31	Affidavit of Elizabeth M. Osenbaugh w/others
Aug. 31	Appendix to Motion to Dismiss w/others
Aug. 31	Motion of Appellees to Dismiss Appeal as Moot or Unripe w/others
Aug. 31	Memorandum in Support of Motion to Dismiss as Moot or Unripe
Aug. 31	Exhibits to Memorandum w/others
Aug. 31	Motion to Dismiss as Moot on Behalf of Appellees w/others
Aug. 31	Memorandum in Support of Motion to Dismiss w/others
Sept. 17	RESPONSE OF Amicus Curiae State of SD in Opposition to Motion of Plaintiffs-Appellees to Dismiss. w/service. w/84-1674/75/1719/21.
Sept. 25	Appellant's Opposition to the Motions of All appellees to Dismiss
Sept. 25	Appellant's Opposition to the Motions of all appellees to Dismiss

DATE	FILINGS—PROCEEDINGS
1984	
Sept. 28	Response of Amici Mid-West Electric, North Dakota Water Users, East River Electric, & Nat'l Water Resources Assn. to Appellees Motions to Dismiss w/others
Oct. 12	ORDER: We remand 1674 & 1675 to the district court for determination of whether the action is now moot. We retain jurisdiction. w/others
1985	
Feb. 25	ORDER: This matter is set for arg. on Tues., 4/9/85, at 3:00 p.m. in St. Louis. Arg. will be limited to the issue of mootness. The aplees. States of MO, IA and NE are granted leave to file a single consolidated brief on the issue of mootness. The brief is limited to 30 pages and is due 3/15/85. Appellees, Kansas City Southern Railway, Sierra Club, and Nebraska, Iowa and Rocky Mountain Chapters of the Nat'l Farmers Union, as well as any other party not named in this order supporting dismissal for mootness, may also file a single, consolidated brief on the issue of mootness. This brief is also due 3/15/85 and limited to 30 pages. Appellants, ETSI and Andrews may each file briefs in opposition. These briefs are due 4/1/85. Each brief is limited to 30 pages. Any other party opposing dismissal may join in these briefs. If the court determines after arg. that these appeals are not moot, a briefing schedule will be entered. The Court will also consider the application for leave to take an interlocutory appeal in Misc. 84-8114. w/others
Mar. 18	*BRIEF OF APPLEES* (Kansas City RR Co., Sierra, et al) on mootness
" "	*BRIEF OF APPELLEES* (State of Missouri, et al) on mootness

DATE	FILINGS—PROCEEDINGS
1985	
" "	*AFFIDAVIT of Eliza Ovrom*
Mar 19	*Transferred to April Session* in St. Louis. w/ others
Apr. 9	ARGUED AND SUBMITTED IN ST. LOUIS *ON THE ISSUE OF MOOTNESS ONLY* TO JUDGES BRIGHT, J. R. GIBSON, and FAGG. Ms. Eliza Ovrom (AAG of Iowa) for appellees (who are movants on motion to dismiss); Mr. Fred R. Disheroon (Just. Dept.) for appellants and Mr. James Hourihan for appellant (Energy Transportation Systems) (who are both respondents as to the motion to dismiss on mootness). Rebuttal by Mr. Stephen E. Roady (for private appellees). Recorded. w/84-1674/75/1719/21.
Apr. 12	Received copy of 28(j) correspondence from counsel for appellees/cr. appellants. (O.K. per L.P.) —TO COURT. w/1675/1676/1719/1721/ Misc. 84-8114. rh
Apr. 22	ORDER: Order of the dist. ct. that this appeal is not moot is affirmed. Appellees have 30 days to file briefs with this Court and appellants may file reply briefs w/in time provided in FRAP 31. (UNPUBLISHED) (with all numbers)
May 3	MOTION of (States) to renew petition for permission to appeal w/others
May 9	ORDER: The petition for permission to appeal under 28 U.S.C. § 1292(b) filed by the Kansas City Southern Railway Co., State of Iowa, State of Missouri and State of Nebraska are granted. This group of appeals and cross-appeals are set for argument on Tuesday, August 20, 1985, at 9:00 a.m. in St. Paul, Minnesota. w/others
May 20	MOTION BY APLEE/CR-APLNT (State of MO) for ext. of time to file reply brief, MOTION GRANTED TO & INCL. 5/24/85 On 5/23/85

DATE	FILINGS—PROCEEDINGS
1985	
May 28	BRIEF APPELLEES (State of MO, IA and NE) w/84-1674/1719/1721
June 3	MOTION BY APLNT for ext. of time to file reply brief
June 7	On Aplnt ETSI's motion, ETSI and Andrew, et al are granted to June 14 to file their reply brief
June 17	REPLY BRIEF OF FEDERAL APPELLANTS (Illegible)
June 14	REPLY BRIEF FOR ENERGY TRANSPORTATION SYSTEMS, INC. w/1675/1719/1721
July 3	REPLY BRIEF FOR STATES OF MISSOURI, IOWA AND NEBRASKA: w/ser 7/1 w/1674, 1675, 1719, 1721
July 22	JOINT APPENDIX, VOLS. 1 & 2. w/all numbers
Aug. 16	NOTIFICATION OF RELATED CASE and filing of original action in the U. S. Supreme Court. (w/84-1674) cg
Aug. 19	Motion for leave to file complaint, complaint & brief in support of motion for leave to file complaint. cg
Aug. 19	APPENDICES A. B. C & D to motion for leave. cg
Aug. 19	Received additional citation from counsel for State of Iowa. cg
Aug. 20	ARGUED & SUBMITTED TO JUDGES J. GIBSON, BRIGHT AND FAGG IN ST. LOUIS, MO. Fred Disneroon for U.S. parties, James A. Hourihan for ETSI Elizabeth Osenbaugh, for State appellees, Stephen Roady, for K.C. RR and Sierra appellees. Mr. Disheroon and Mr. Hourihan on Rebuttal. RECORDED w/all others. (cm)

DATE	FILINGS—PROCEEDINGS
1985	
Aug. 19	Received copy of 28(j) correspondence from counsel for State appellees. (O.K. per L.P.)—rh —TO COURT.
Aug. 27	Motion of counsel for the State of Iowa, requesting leave to cite additional documents after oral argument. Also leave to file a further brief in the matter. rh
Sept. 24	ORDER: The request of the State of Iowa to furnish additional citations granted. All parties may file on or before 9/30/85 a filing not to exceed 3 pages on the citations. Additional argument will not be allowed. (UNPUBLISHED) w/all numbers) cg
Oct. 1	ETSI's Submission in Response to the Court's Order of Sept. 24, 1985. w/others
Oct. 1	Response of Appellees to Order of Sept. 24, 1985 w/others
Oct. 4	Response of Federal Appellants to the Court's Sept. 24, 1985 Order w/others
Oct. 23	Rec'd Supreme Court Brief of Defendants in Opposition to Motion for Leave to File Complaint and Appendix w/others
Nov. 4	Received Reply Brief in Support of Motion for Leave to File Complaint
1986	
Mar. 13	OPINION BY John R. Gibson PUBLISHED DISSENT by Bright w/all nos.
Mar. 13	JUDGMENT: Judgment of dist ct is affirmed in accord w/opinion. w/all

DATE	FILINGS—PROCEEDINGS
1986	
March 13	ORDER: Opinion filed this date includes the disposition of case No. 85-1593. The opinion is hereby modified to include case 85-1593. (w/case no. 85-1593/84-1674/1675/1719/1721) cg
Mar. 28	APPELLEES/CROSS APPELLANTS, STATE OF MISSOURI, IOWA AND NEBRASKA, BILL OF COSTS. w/service. w/1674/1675/1719/1721. rh
Apr. 25	RESPONSE OF PRIVATE APPELLEES TO FEDERAL APPELLANTS' OBJECTION TO BILL OF COSTS. w/service. w/1674, et al. rh
Apr. 28	PETITION APPELLANTS', ENERGY TRANSPORTATION SYSTEMS, INC., FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674, et al. rh
Apr. 30	PETITION APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC w/service. w/1674, et al. rh
May 5	ORDER: The bill of costs submitted by appellees Kansas City Southern Railway Company, et al., has been considered by the Court, and is denied. w/1674/1675/1719/1720/1721-NE. rh.
May 15	ORDER: Appellees' motion for extension of time to file response to the petitions for rehearing en banc filed herein is granted. Appellees may have to and including June 2, 1986 to file response. w/1674/1675/1719/1721. rh
May 13	MOTION APPELLEES FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO THE PETITION FOR REHEARING. w/service. w/1674/1675/1719/1721. rh
May 30	APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING. w/service. w/1674/1675/1719/1721. rh

DATE	FILINGS—PROCEEDINGS
1986	
June 2	APPELLEES'S STATES, MISSOURI, IOWA AND NEBRASKA RESPONSE TO PETITION FOR REHEARING EN BANC. w/service. w/ 1674/1675/1719/1721. rh
July 10	ORDER: APPELLANTS' petitions for rehearing en banc have been considered by the Court and are denied. Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions. Petitions for rehearing by the panel are also denied. w/others eh
July 22	MANDATE ISSUED w/others eh
July 28	RECEIPT FOR MANDATE. w/others. rmh

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1721

THE STATE OF MISSOURI, *et al.*,
Appellants

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1984	
June 6	Docketed cross appeal
" "	Certified copies of notice of cross appeal; docket entries and orders rec'd from District Court. (1)
June 6	BRIEFING SCHEDULE: DR aplnt/aplee (Fed. Govt. ETS) and DR apee/cr. aplnt (states) due 6/14/84, clerk's record 6/25/84 or joint appendix due 7/5/84 tr. due 6/25/84, brief aplnt (Fed/ETS due 7/5/84, brief aplee/cr. aplnt (States) due 8/6/84, brief aplees KCSRwy/Sierra, et al due 8/6/84, reply aplnt/cr. aplee (Fed/ETS) due 8/20/84, reply brief/cr. aplnt (States) due 9/3/84 w/others.
June 11	Appearance for State of Missouri (2)
June 15	MOTION of aplees for ext. of time to designate record MOTION GRANTED 10 days after aplnt designates. NO EXT. OF BRIEFING SCHEDULE on 6/15/84 w/others

DATE	FILINGS—PROCEEDINGS
1984	
June 18	Appearance for appellee (3)
June 21	Appearance for federal appellees (4)
July 5	*BRIEF APPELLANT* (ETSI) w/others
July 5	*BRIEF AMICUS CURIAE* (State of South Dakota) w/others
July 10	*BRIEF APPELLANT* (Govt) w/others
July 25	TO SCREENING w/1674,5,1719,20/30 min
Aug. 2	Motion for Extension of Time and Memorandum in Support Thereof w/others
Aug. 3	Notice of Private appellees Kansas City Southern Railway Co., The Sierra Club, & the Iowa and Nebraska Chapters of the Nat'l Farmers Union Concerning Request for Extension of Time w/others
Aug. 6	Petition for Permission to Appeal Interlocutory Order Certified by District Court w/others
Aug 10	FEDERAL APPELLANTS' response to Appellee States' motion for extension of time w/service w/all nos.
Aug 15	Transferred to September session. At St. Louis, Mo. 16745/1719,20
Aug. 16	ORDER: Motion of Missouri, Iowa, and Nebraska for permission to appeal interlocutory orders certified by the district court and filed on 8/6/84 is denied without prejudice pending consideration of a suggestion of mootness which may be made by the parties in relation to the appeal from an injunction by the district court dated 5/3/84. The motion of Kansas City Southern RR Co. for permission to appeal interlocutory orders is also denied without prejudice for the reason stated above. The motion for ext. of

DATE	FILINGS—PROCEEDINGS
1984	
	time is granted and the appeals from the injunction of the district court dated 5/3/84 are stricken from the calendar of the Sept. Session of this court. The court requests that any suggestions of mootness of the case and any opposition to such suggestions be promptly filed by interested parties w/all others.
Aug. 20	REPLY of federal appellants to petition by states to appeal interlocutory order. (w/all other numbers) cg
Aug. 31	Motion to Dismiss ETSI's Appeal w/others
Aug. 31	Suggestions of Mootness w/others
Aug. 31	States' Memorandum on Mootness and Ripeness w/others
Aug. 31	Affidavit of Elizabeth M. Osenbaugh w/others
Aug. 31	Appendix to Motion to Dismiss w/others
Aug. 31	Motion of Appellees to Dismiss Appeal as Moot or Unripe w/others
Aug. 31	Memorandum in Support of Motion to Dismiss as Moot or Unripe
Aug. 31	Exhibits to Memorandum w/others
Aug. 31	Motion to Dismiss as Moot on Behalf of Appellees w/others
Aug. 31	Memorandum in Support of Motion to Dismiss w/others
Sept. 17	RESPONSE of Amicus Curiae State of SD in Opposition to Motion of Plaintiffs-Appellees to Dismiss. w/service. w/84-1674/75/1719/20.
Sept. 25	Appellant's Opposition to the Motions of All Appellees to Dismiss

DATE	FILINGS—PROCEEDINGS
1984	
Sept. 25	Appellant's Opposition to the Motions of all Appellees to Dismiss
Sept. 28	Response of Amici Mid-West Electric, North Dakota Water Users, East River Electric, & Nat'l Resources Assn. to Appellees Motions to Dismiss w/others
Oct. 12	ORDER: We remand 1674 & 1675 to the district court for determination of whether the action is now moot. We retain jurisdiction. w/ others (UNPUB)
1985	
Feb. 25	ORDER: This matter is set for arg. on Tues., 4/9/85, at 3:00 p.m. in St. Louis. Arg. will be limited to the issue of mootness. The aplees States of MO, IA and NE are granted leave to file a single consolidated brief on the issue of mootness. The brief is limited to 30 pages and is due 3/15/85. Appellees, Kansas City Southern Railway, Sierra Club, and Nebraska, Iowa and Rocky Mountain Chapters of the Nat'l Farmers Union, as well as any other party not named in this order supporting dismissal for mootness, may also file a single, consolidated brief on the issue of mootness. This brief is also due 3/15/85 and limited to 30 pages. Appellants, ETSI and Andrews may each file briefs in opposition. These briefs are due 4/1/85. Each brief is limited to 30 pages. Any other party opposing dismissal may join in these briefs. If the court determines after arg. that these appeals are not moot, a briefing schedule will be entered. The Court will also consider the application for leave to take an interlocutory appeal in Misc. 84-8114. w/others
Mar. 18	*BRIEF OF APLEES* (Kansas City RR Co., Sierra, et al) on mootness

DATE	FILINGS—PROCEEDINGS
1985	
" "	*BRIEF OF APLEES* (State of Missouri, et al) on mootness
" "	*AFFIDAVIT of Eliza Ovrom*
Mar 19	*Transferred to April Session* in St. Louis. w/ others
Apr. 9	ARGUED AND SUBMITTED IN ST. LOUIS *ON THE ISSUE OF MOOTNESS ONLY* TO JUDGES BRIGHT, J. R. GIBSON, and FAGG. Ms. Eliza Ovrom (AAG of Iowa) for appellees (who are movants on motion to dismiss); Mr. Fred R. Disheroon (Just. Dept.) for appellants and Mr. James A. Hourihan for appellant (Energy Transportation Systems) (who are both respondents as to the motion to dismiss on mootness). Rebuttal by Mr. Stephen E. Roady (for private appellees). Recorded. w/84-1674/75/1719/20.
Apr. 12	Received copy of 28(j) correspondence from counsel for appellees/cr. appellants. (O.K. per L.P.) —TO COURT. w/1675/1676/1719/1720/ Misc. 84-8114. rh
Apr. 22	ORDER: Order of the dist. ct. that this appeal is not moot is affirmed. Appellees have 30 days to file briefs with this Court and appellants may file reply briefs w/in time provided in FRAP 31. (UNPUBLISHED) (with all numbers)
May 3	MOTION of (States) to renew petition for permission to appeal w/others
May 9	ORDER: The petition for permission to appeal under 28 U.S.C. § 1292(b) filed by the Kansas City Southern Railway Co., State of Iowa, State of Missouri and State of Nebraska are granted. This group of appeals and cross-appeals are set for argument on Tuesday, August 20, 1985, at 9:00 a.m. in St. Paul, Minnesota. w/others

DATE	FILINGS—PROCEEDINGS
1985	
May 20	MOTION BY APLEE/Cr-Aplnt for ext. of time to file reply brief, MOTION GRANTED TO & INCL. 5/24/85 on 5/23/85
May 28	*BRIEF APPELLEES* (State of MO, IA and NE) w/84-1674/1719/1720
June 3	MOTION BY APLNT for ext. of time to file reply brief
June 7	On Aplnt ETSI's motion, ETSI and Andrew, et al are granted to June 14, 1985 to file their reply brief
June 17	*REPLY BRIEF OF FEDERAL APPELLANTS* w/1674/1719/1720
June 14	*REPLY BRIEF FOR ENERGY TRANSPORTATION SYSTEMS, INC.* w/1675/1719/1720
July 3	*REPLY BRIEF FOR STATES OF MISSOURI, IOWA AND NEBRASKA*: w/ser 7/1 w/1674, 1675, 1719, 1720
Aug. 16	NOTIFICATION OF RELATED CASE and filing of original action in the U. S. Supreme Court. (w/84-1674) cg
July 22	JOINT APPENDIX, VOLS. 1 & 2. w/all numbers
Aug. 19	Motion for leave to file complaint, complaint & brief in support of motion for leave to file complaint. cg
Aug. 19	APPENDICES A. B. C & D to motion for leave. cg
Aug. 19	Received additional citation from counsel for State of Iowa. cg
Aug. 20	ARGUED & SUBMITTED TO JUDGES J. GIBSON, BRIGHT AND FAGG IN ST. LOUIS, MO. Fred Disheroon for U.S. parties, James A. Hour-

DATE	FILINGS—PROCEEDINGS
1985	
	ihan for ETSI, Elizabeth Osenbaugh, for State appellees, Stephen Roady, for K.C. RR and Sierra appellees. Mr. Disheroon and Mr. Hourihan on Rebuttal. RECORDED w/all others.
Aug. 19	Received copy of 28(j) correspondence from counsel for State appellees. (O.K. per L.P.)—rh—TO COURT.
Aug. 27	Motion of counsel for the State of Iowa, requesting leave to cite additional documents after oral argument. Also leave to file a further brief in the matter. rh.
Sept. 24	ORDER: The request of the State of Iowa to furnish additional citations granted. All parties may file on or before 9/30/85 a filing not to exceed 3 pages on the citations. Additional argument will not be allowed. (UNPUBLISHED) (w/all numbers) cg
Oct. 1	ETSI's Submission in Response to the Court's Order of Sept. 24, 1985. w/others
Oct. 1	Response of Appellees to Order of Sept. 24, 1985 w/others
Oct. 4	Response of Federal Appellants to the Court's Sept. 24, 1985 Order w/others
Oct. 23	Rec'd Supreme Court Brief of Defendants in Opposition to Motion for Leave to File Complaint and Appendix w/others
Nov. 4	Received Reply Brief in Support of Motion for Leave to File Complaint
1986	
Mar. 13	OPINION BY John R. Gibson PUBLISHED DISSENT by Bright w/all nos.

DATE	FILINGS—PROCEEDINGS
1986	
Mar. 13	JUDGMENT: Judgment of dist ct is affirmed in accord w/opinion. w/all
March 13	ORDER: Opinion filed this date includes the disposition of case No. 85-1593. The opinion is hereby modified to include case 85-1593. (w/Case No. 85-1593 and 84/1674/1675/1719/and 1720) cg
Mar. 28	APPELLEE/CROSS APPELLANTS, STATE OF MISSOURI, IOWA AND NEBRASKA, BILL OF COSTS. w/service. w/1674/1675/1719/1720. rh.
Apr. 25	RESPONSE OF PRIVATE APPELLEES TO FEDERAL APPELLANTS' OBJECTION TO BILL OF COSTS. w service. w 1674/1675/1719/1720-NE. rh (RECEIVED)
Apr. 28	PETITION APPELLANTS', ENERGY TRANSPORTATION SYSTEMS, INC., FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/1675/1719/1120. rh
Apr. 30	PETITION APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/1675/1719/1720. rh
May 5	ORDER: The bill of costs submitted by appellees Kansas City Southern Railway Company, et al., has been considered by the Court, and is denied. w/1674/1675/1719/1720-NE. rh
May 15	ORDER: Appellees' motion for extension of time to file response to the petitions for rehearing en banc filed herein is granted. Appellees may have to and including June 2, 1986 to file response. w/1674/1675/1719/1720. rh

DATE	FILINGS—PROCEEDINGS
1986	
May 13	MOTION APPELLEES FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO THE PETITION FOR REHEARING. w/service. w/ 1674/w/1675/1719/1720. rh
May 30	APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING. w/service. w/ 1674/1675/1719/1720. rh
June 2	APPELLEES' STATES, MISSOURI, IOWA AND NEBRASKA RESPONSE TO PETITION FOR REHEARING EN BANC. w/service. w/ 1674/1675/1719/1720. rh
July 10	ORDER: APPELLANTS' petitions for rehearing en banc have been considered by the Court and are denied. Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions. Petitions for rehearing by the panel are also denied. w/others eh
July 22	MANDATE ISSUED w/others eh
July 28	RECEIPT FOR MANDATE. w/others. rmh

ADMINISTRATIVE RECORD 900065

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

[Nov. 27, 1974]

Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: Authority of Secretary of the Interior to Market Municipal and Industrial Water from Missouri River Basin, Pick-Sloan Project

You have inquired whether you have the authority to market water from the six mainstem reservoirs in the Missouri River Basin, Pick-Sloan Project, for municipal and industrial purposes. The water that would be sold is that for which storage capacity was provided in said reservoirs for irrigation and for the probable extent of future irrigation, but which it will not be possible to market for the latter purposes during the terms of the proposed M&I contracts.

It is my conclusion that you have such authority under Section 9 of the Flood Control Act of December 22, 1944, 58 Stat. 891. Section 9 authorized the construction by the Corps of Engineers and the Bureau of Reclamation of a comprehensive plan for the development of the Missouri River Basin, including the mainstem and its tributaries. This is the so-called "Pick-Sloan Project," named for the respective Corps of Engineers and Bureau of Reclamation authors of the two studies upon which the legislation was based. The Pick plan, set forth in H. Doc. 475, 78th Cong., 2d sess., was the Corps study, and the Sloan plan, set forth in S. Doc. 191, 78th Cong., 2d sess., was the Bureau study. These were revised and coordinated by S. Doc. 247, 78th Cong., 2d sess.

Section 9 of the 1944 Flood Control Act provides as follows:

(a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the

works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior. (58 Stat. 891)

Under this authority the Corps has six dams and reservoirs on the mainstem of the Missouri River. This includes Fort Peck, the construction of which predated the Act but the operation of which is integrated in the Pick-Sloan Project, as contemplated in Senate Document 247 (p. 2). Under S. Doc. 247 (p. 1) the Corps was given the responsibility for determining reservoir capacities for flood control and navigation, and the Bureau was given the responsibility for determining reservoir capacities for irrigation and the probable extent of future irrigation.

In the Pick plan (H. Doc. 475, p. 28-29) the purposes for the mainstem reservoirs were described as follows:

> In addition to providing flood-control benefits on the Missouri and Mississippi Rivers, the comprehensive plan would also provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, *domestic and sanitary* purposes, wildlife, and recreation [Emphasis].

The concept of multiple-purpose use was further developed by the Bureau's comments on the Pick plan (H. Doc. 475, p. 7), the substance of which was also repeated in the Sloan plan (S. Doc. 191, p. 10):

> In planning the control and utilization of the waters of the Missouri Basin, and widest range of multiple benefits should be sought in each feature or group of features. All reservoirs included in the comprehensive plan, including Fort Peck, should be op-

> erated to obtain the maximum benefits in common for flood control, navigation, irrigation, power generation, and other water-conservation activities, *including, but not limited to,* utilization for fish and wildlife preservation, recreation, pollution abatement, maintenance of surface and ground water levels, silt control, and *domestic and industrial purposes.* To the extent, however, that several functions of water control and utilization are conflicting, preference should be given to functions which contribute most significantly to the welfare and livelihood of the largest number of people. It is, for example, the view of the Bureau of Reclamation, that the waters of the Missouri River and its tributaries west of or entering above Sioux City are more useful to more people if utilized for *domestic,* agricultural, and *industrial* purposes than for navigation-improvement purposes. To the extent that these uses are competitive, *domestic,* agricultural, *and industrial uses should have preference* [Emphasis].

The Bureau's concluding recommendation was actually incorporated in Section 1(b) of the 1944 Flood Control Act, 58 Stat. 887, as follows:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

In the Sloan plan, the project purposes were further described as follows (S. Doc. 191, p. 10):

> It is a comprehensive plan for the highest beneficial use of the waters of the basin. It provides for flood

> control, navigation, irrigation, power development, *domestic and industrial water supplies* [Emphasis], silt control, recreational use of waters, conservation of fish and wildlife, and pollution abatement, and will assist in the restoration and maintenance of ground-water levels and inland lakes.

In accordance with the foregoing plans, capacity was included by the Bureau in the mainstem reservoirs for municipal and industrial purposes, as well as for irrigation and the probable extent of future irrigation, and the benefits and allocations of costs were determined under Reclamation law, as provided for in Section 9(c) of the 1944 Flood Control Act. In the Sloan plan (S. Doc. 191, p. 13) the principal contribution to municipal and industrial water supplies was viewed as the increase in the surface and ground-water supplies that were then being used for those purposes.

It is clear that where capacity has been included in the mainstem reservoirs at the request of the Bureau of Reclamation for irrigation and municipal and industrial purposes, the water available from such capacity is to be marketed for such purposes by the Bureau of Reclamation under the Reclamation laws, just as the hydroelectric power generated at those reservoirs is now being marketed by the Bureau of Reclamation under the Reclamation laws.

The Sloan plan outlined the arrangements as follows (S. Doc. 191, p. 11):

> The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where the flood control and navigation

> functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. All irrigation features should be operated by the Bureau of Reclamation or its agents. All reservoirs in which irrigation, restoration of surface and ground waters [municipal and industrial supplies], or power, is dominant, should be operated by the Bureau of Reclamation. Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.

These arrangements were translated into the 1944 Flood Control Act by Subsection 9(c), which provides that the reclamation and power features "shall be governed by the Federal Reclamation Laws."

Although the Sloan plan (S. Doc. 191, p. 13) provides that water will be diverted from some of the mainstem reservoirs of the project for municipal and industrial purposes, it was not contemplated in the original plan that every mainstem reservoir would be used for such purposes. However, you now inform me that it may not be feasible within the next 40 years and more to use all of the capacity provided for irrigation in the mainstem reservoirs, and you have inquired whether you have authority, in the interim, also to market for municipal and industrial purposes the water available from the irrigation capacity. On the basis of a determination by you that within the times for which the M&I contracts are to be written it will not be feasible to market such water for irrigation purposes and that the efficiency of the project for irrigation purposes will not thereby be impaired, you would, in my opinion, have authority to market such water for municipal and industrial purposes.

Under the Reclamation laws, particularly Section 9(c) of the Reclamation Project Act of August 4, 1939, 43 U.S.C. 485h(c), you have express authority to market

water for municipal and industrial uses, along with your authority under Section 9(d) and Section 9(e) of said Act to market water for irrigation uses.

Section 9(c) of the 1939 Reclamation Project Act, after authorizing the Secretary of the Interior to enter into contracts to furnish water for municipal water supply or miscellaneous purposes, further provides:

> No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

You are, accordingly, clearly authorized to make M&I contracts if you find that they do not impair the efficiency of the project for irrigation purposes.

Where because of changed circumstances it is not feasible to market, within the time periods originally contemplated, the amount of water available from the reservoir capacity provided for irrigation and the probable extent of future irrigation, you have not only the authority but, in my opinion, the responsibility as well, to apply that water to another beneficial use, such as municipal and industrial purposes. In the light of the objectives stated in the Pick-Sloan plans of comprehensive resource development and of best resource use, it must be inferred that Congress did not intend the opportunity to be lost to put the irrigation water to another beneficial use during the period that it was not feasible to use it for irrigation purposes.

If such water is diverted for municipal and industrial purposes, it might not be available for the generation of as much hydroelectric power as could otherwise be generated if the water were to be passed through all of the turbines of all of the mainstem reservoirs. However, the same would have been true if the water had been diverted for irrigation use, as was originally contemplated when

the storage capacity in the reservoirs was authorized. It cannot, therefore, be said that the diversion for municipal and industrial purposes will be inconsistent with the authorized development of hydroelectric power.

Moreover, as Senate Document 247 said (p. 1):

> Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin *consistent with the other beneficial uses of water* [Emphasis).

Therefore, the decision as to whether it would be more beneficial to use such water for municipal and industrial purposes than for the supplemental generation of hydroelectric power would be a matter of sound administrative discretion.

/s/ Kent Frizzell
Solicitor

cc: Assistant Secretary—Land and Water Resources
Commissioner of Reclamation
Regional Solicitor, Billings

Solicitor's reading file
Mr. London
E&R Division Files
Docket
Reading—ELondon:lel 11-27-74

ADMINISTRATIVE RECORD 900407

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20319

16 Dec. 1974

MEMORANDUM FOR THE CHIEF,
OFFICE OF CIVIL FUNCTIONS

SUBJECT: Marketing of Missouri River Water for
/s/ Jack Coal Gasification

I have reviewed at your request the conflicting opinions of the General Counsel, OCE, and the Assistant Solicitor, Department of Interior, regarding whether either the Secretary of the Army or the Secretary of Interior has statutory authority to contract for the sale of water from the six reservoirs in the main stem of the Missouri River constructed and maintained by the Corps of Engineers pursuant to the Flood Control Act of 1944, sec. 9, P.L. 78-534, 58 Stat. 891.

Conclusion

I have concluded that I cannot endorse the opinion of the General Counsel, OCE, that neither secretary possesses the requisite authority. As a caveat, it should be noted that this question has never been directly addressed by either Congress or the courts. As a result, the legislation is subject to differing interpretations. It should be understood that my conclusion is simply that the legislation is sufficiently ambiguous that I cannot concur with the OCE opinion that the water cannot be marketed jointly by the two secretaries for the purpose of use in coal gasification. It should further be noted that this opinion relates only to the statutory authority for marketing of water for coal gasification otherwise available for that use; no opinion is expressed with regard to the relation-

ship of state water rights law to the sale of water for such a use.

For these reasons, notwithstanding my opinion that there is arguable authority for the Secretaries of Army and Interior, acting jointly, to market water from the main stem reservoirs for this purpose, I strongly advise that legislation establishing a systematic marketing program be sought. In view of the strongly competing interests in the water of the Missouri River, as well as the strong opposition by environmental groups to coal gasification and concomitant strip mining, *see Sierra Club* v. *Morton*, Civil Action No. 1182-73 (D.D.C.), appeal pending (D.C. Cir.), we can anticipate that any effort to market the water in reliance on statutory authority which does not directly and clearly authorize such marketing will be productive of extensive litigation which would considerably delay execution of any contracts. Since execution of contracts must be delayed in any event pending compliance with NEPA, the concurrent delay associated with enactment of authorizing legislation is less likely to postpone the ultimate date for delivery of the water than delay engendered by litigation commencing at that point where the first contract is about to be executed. Although I therefore consider legislation advisable, I can see no objection in the interim to proceeding on the basis of already existing authority and designating the Bureau of Reclamation to act as the agent of the Secretary of Interior and Secretary of the Army in the negotiation of contracts and the preparation of an EIS, so long as it is agreed that no contracts shall be executed without the approval of the Secretary of the Army and the Secretary of Interior. I, therefore, provide as Enclosure 1 a draft Memorandum of Understanding which I could recommend that the Secretary sign.

Discussion

The six main stem reservoirs in the Missouri River were constructed by the Corps of Engineers pursuant to

section 9 of the Flood Control Act of 1944, Pub. L. 78-534, 58 Stat. 891. That act authorized construction of the main stem reservoirs, along with a number of tributary reservoirs to be constructed by the Department of Interior, as proposed in the general comprehensive plans set forth by the Corps of Engineers in House Document 475 and by the Bureau of Reclamation in Senate Document 191, 78th Congress, and coordinated and revised by Senate Document 247. *See id.*, § 9(a), 58 Stat. 891. This comprehensive plan has become known as the Pick-Sloan Plan, after the authors of the two separate plans of the Corps and the Bureau.

Each of the separate plans set forth in considerable detail the justification for the particular reservoirs proposed. In consolidating these proposals, Senate Document 247 states which reservoirs were authorized for construction and the approximate capacity of each. In stating the proposed capacity of each reservoir, the Pick-Sloan plan identified the uses contemplated for the water in each reservoir and in very general terms related the capacity proposed to those uses. Thus, for example, in recommending the construction of the Oahe Dam near Pierre, South Dakota, with a capacity of 19,600,000 acre-feet as recommended in Senate Document 191, rather than 6,000,000 acre-feet as recommended in House Document 475, the Pick-Sloan plan noted that,

> The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes. If the Oahe Reservoir is constructed to the elevation proposed in Senate Document 191, Seventy-eighth Congress, second session, a greater storage capacity will be provided than contemplated in the low Oahe and Oak Creek Reservoirs at considerably less cost.

It is significant that the total capacity for the main stem reservoirs recommended in the Pick-Sloan plan and approved by Congress was 42,150,000 acre-feet, as compared to 35,200 acre-feet in the Corps (Pick) Plan, H. Doc. 475, and 24,950 acre-feet in the Bureau (Sloan) Plan, S. Doc. 191. The joint Pick-Sloan Plan concluded that,

> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods. The plan also utilizes practically all of the available power head in the Missouri River between the mouth of the Yellowstone River and the Gavins Point Dam.

In addition to determining the capacity of the reservoirs to be constructed, the Pick-Sloan Plan assigned responsibilities for determining how the waters stored in the reservoirs should be used. To this end, the plan enunciated the following "basic principles:"

> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.
>
> (c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

The legislation itself further detailed the priorities for use of the water and the methods by which the water was to be committed to particular uses. Section 1(b) of the 1944 Act expressly provided that the use of the storage for navigation was to be subordinate to "beneficial consumptive uses":

> (b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Further, section 9(c) made plain that the use of the storage for "reclamation and power" purposes falls under the aegis of the Secretary of Interior. In this regard, the Act provided,

> Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

Finally, the Act granted the Secretary of the Army general authority

> to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such

> terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: Provided, That no contracts for such water shall adversely affect then existing lawful use of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

Id., § 6.

As I understand the views of the General Counsel, OCE, no water in the main stem reservoirs would be available for sale for municipal or industrial purposes, including coal gasification, so long as it is otherwise being used for the purposes specifically identified in the Pick-Sloan plan. These, of course, are: flood control, navigation, irrigation, and power. Since all water not used consumptively for irrigation or otherwise held within the reservoirs for flood control or navigation purposes, is currently run through the generators to produce hydroelectric power, it is his view that no water may be sold for municipal and industrial purposes.

Reclamation law grants the Secretary of Interior general authority to market water for municipal and industrial purposes so long as such marketing "will not impair the efficiency of the project for irrigation purposes." 42 U.S.C. § 485h. Since the Act of 1944 states that, "Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayment by water users, made in Said House and Senate Documents, the reclamation and power developments undertaken by the Secretary of Interior shall be governed by the Federal Reclamation laws," it would appear that the Secretary of Interior could market the water for municipal and industrial purposes so long as he determines that doing so would not interfere with irrigation, unless there is something in the Pick-Sloan plan approved by Congress foreclosing such marketing.

As a reading of the language of the Act and the Pick-Sloan plan quoted above indicates, the Missouri River reservoir system was broadly conceived. Although the capacities of the various reservoirs were based on the expected needs of the basin primarily with regard to flood control, irrigation, navigation, and hydroelectric power, no specific allocation as between these various purposes was attempted. Rather, the needs of each category were left to be determined, in the case of flood control and navigation, by the Secretary of the Army, and in the case of irrigation, by the Secretary of Interior. Moreover, ample capacity beyond that expected to be needed for flood control, navigation, and irrigation was provided so as to assure that the reservoir system could "utilize practically all of the available power head in the Missouri River . . . ." S. Doc. 247, p. 4.

Where there might be conflicts between various uses, the Act and the plan it approved established certain priorities. These priorities were not stated narrowly, in terms of the uses of the storage identified specifically in the Pick-Sloan plan. Rather, the Act broadly stated that navigation was to be subordinate to all beneficial consumptive uses. Likewise, the development of hydroelectric power was to be the fullest possible "consistent with the other beneficial uses of water." In view of this language, it would not appear that Congress intended that the use of storage capacity for power or navigation should be asserted as a barrier to the use of that storage for another beneficial use of the water pursuant to a general authority for use of water for such a purpose.

Especially in view of the assignment of primary responsibility for power development to the Secretary of Interior, see 43 U.S.C. § 485h; P.L. 78-534, § 5, 58 Stat. 890, I believe that the Department of the Army should consider itself bound by an interpretation of the Pick-Sloan plan on the part of Interior which would treat the goal of fullest development of hydroelectric power as

subordinate to other beneficial uses of water, including those which may not have been contemplated at the time the reservoir system was originally conceived, the opportunity for which has developed subsequently. I therefore conclude that if Interior certifies that the storage proposed to be marketed for industrial purposes in connection with coal gasification "will not impair the efficiency of the project for irrigation," 43 U.S.C. § 485h, the Army should be prepared jointly to cooperate with Interior in determining whether coal gasification presents an opportunity for beneficial use of the water which should take precedence over hydroelectric power, unless it determines, pursuant to its responsibility under S. Doc. 247, that such use would interfere with the operation of the reservoirs for flood control. If the Army and Interior acting individually and jointly are able to make the necessary determinations, I see no legal reason why water from the main stem reservoirs could not be marketed for industrial purposes by the Secretary of Interior pursuant to 43 U.S.C. § 485h.*

If storage is marketed for use in coal gasification, § 9 (c) would appear to require, since the sale would reduce the generation of hydroelectric power and perhaps impair somewhat the navigation benefits of the main stem system, that the price charged for the water be adequate to reimburse the Treasury for the power and navigation revenues foregone, if any.

/s/ Dick
Richard V. Kearney,
Acting General Counsel

---

* I do agree with the General Counsel, OCE, opinion that water for the main stem reservoirs may not be marketed by the Secretary of the Army as "surplus" water under section 6 of the 1944 Act. I further agree that the Secretary of Interior may not market the water from these reservoirs independently.

ADMINISTRATIVE RECORD 900072

MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

This Memorandum of Understanding is entered into this 24th day of February, 1975, between the Secretary of the Interior and the Secretary of the Army in order to expedite the use of water for energy development in the Missouri River Basin. The terms hereof apply only to the six main stem reservoirs of the Corps of Engineers on the Missouri River.

1. The Secretary of the Interior shall determine the amounts of water available from the capacity provided in the main stem reservoirs for irrigation and for the probable extent of future irrigation and shall also determine the extent and for what duration such amounts of water will not be needed for irrigation and for the probable extent of future irrigation.

2. The Secretary of the Army shall determine how much of the water determined by the Secretary of the Interior to be excess to present irrigation needs can be made available for industrial uses.

3. The parties hereby agree that the Secretary of the Interior may, pursuant to applicable authorities, both on his own behalf and as agent for the Secretary of the Army, contract for the marketing of water for industrial uses and incidental purposes related thereto from the six main stem reservoirs as will not be needed for irrigation for a given period and as will not interfere with the operation of the reservoirs for flood control; provided, however, that

a. The Secretary of the Army shall retain all operational and managerial control over said reservoirs;

b. Contracts for the marketing of such water shall be executed under the terms of this agreement with full compliance with the requirements of the National Environmental Policy Act;

c. No contract for the marketing of such water shall be executed but on such terms and conditions as are mutually agreeable to the parties hereto; and

d. To the extent such contracts would reduce the quantity of power generated, no contract may be executed unless it has been determined jointly by the parties to this agreement that the proposed marketing for industrial purposes is a beneficial use of the water which should take precedence over hydroelectric power generation.

4. The Secretary of the Interior shall have the lead agency responsibility for compliance with the requirements of the National Environmental Policy Act.

5. This Memorandum of Understanding shall terminate at the end of two years. Contracts executed pursuant to this Memorandum of Understanding shall not be affected by such termination. During the term hereof, the Secretary of the Interior and the Secretary of the Army shall further cooperate in developing a long-range marketing program for municipal and industrial water.

/s/ Rogers C. B. Morton
Secretary of the Interior

/s/ Howard H. Callaway
Secretary of the Army

EXTENSION OF MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

We, the undersigned, hereby extend the February 24, 1975, Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army on Missouri River water marketing until May 1, 1977.

/s/ Thomas S. Kleppe
Secretary of the Interior

/s/ Martin R. Hoffman
Secretary of the Army

MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

We, the undersigned, hereby further extend the February 24, 1975, Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army on Missouri River water marketing until September 1, 1977.

/s/ Cecil D. Andrus
Secretary of the Interior

_____

Secretary of the Army

MEMORANDUM OF UNDERSTANDING AMONG THE SECRETARY OF THE INTERIOR THE SECRETARY OF THE ARMY AND THE SECRETARY OF ENERGY

The Memorandum of Understanding entered into on the 24th day of February 1975, between the Secretary of the Interior and the Secretary of the Army and last extended by mutual consent to September 1, 1977 (copy attached and made a part hereof), is hereby extended to December 31, 1978. The Secretary of Energy concurs in this extension and shall be a party to the purposes identified herein:

The Secretary of the Interior and the Secretary of the Army have fulfilled items 1 and 2 of the February 24, 1975, Memorandum of Understanding (MOU) and have determined that 1 million acre-feet of water surplus to interim irrigation needs can be made available for industrial use. Items 3, 4, and 5 of that MOU represent ongoing work activities associated with contracts and environmental statements and other matters associated with the marketing of water from the six main-stem reservoirs built by the Corps of Engineers on the Missouri River. Item 3.d. of that MOU involves a determination of energy efficiency and, as a consequence, does impact on the responsibities of the Department of Energy established on October 1, 1977.

Subsection 3.d. is hereby modified as follows: "To the extent such contracts would reduce the quantity of power generated, no contract may be executed unless it has been determined jointly by the Secretary of Energy, the Secretary of the Army, and the Secretary of the Interior, that the proposed marketing for industrial purposes is a beneficial use of the water which should take precedence over hydroelectric power generation."

All other provisions of the February 24, 1975, MOU remain as previously established.

/s/ James A. Joseph Secretary of the Interior	4/21/78 Date
/s/ Clifford L. Alexander, Jr. Secretary of the Army	May 17, 1978 Date
/s/ James R. Schlesinger Secretary of Energy	6/19/78 Date

ADMINISTRATIVE RECORD 900089

SECRETARY OF THE ARMY
Washington

18 Mar. 1975

Honorable Rogers C. B. Morton
Secretary of the Interior
Washington, D.C. 20240

Dear Rog:

The Memorandum of Understanding with relation to the Missouri River which we signed recently should permit early negotiations with potential industrial users of water. The MOU is, however, a temporary solution only pending the completion of studies and clarification of outstanding issues relating to legislation, pricing, project formulation and cost allocation.

My greatest concern is that the statutes relating to marketing the water for industrial purposes are unclear. Fortunately, the Chief of Engineers has a current study of the upper Missouri, authorized and funded by the Congress, which will result in recommendations including possible modification of the operations of the six main stem projects. There should also be proposals for legislative authority to support any modifications, including those relating to this marketing effort.

Of course, we will need the help of the Department of the Interior, and I am convinced that with your support, this study will lead to a strengthening of authorities for the long-term use of Missouri River water for industrial purposes.

Sincerely,

/s/ Bo
HOWARD H. CALLAWAY

ADMINISTRATIVE RECORD 900399

DEPARTMENT OF THE ARMY
MISSOURI RIVER DIVISION, CORPS OF ENGINEERS
P.O. Box 103, Downtown Station
Omaha, Nebraska 68101

4 Oct. 1978

MRDPD

Mr. E. R. Wilde
Acting Regional Director
Upper Missouri Region
Bureau of Reclamation
P. O. Box 2553
Billings, Montana 59103

Dear Mr. Wilde:

This responds to your 12 September 1978 letter requesting input to an assessment of the merits of continuing the industrial water marketing program for the main stem reservoirs. As you are aware, this office has been involved in this program, not only as the manager of the system, but also as participants in the ad hoc studies conducted by the Missouri River Basin Commission. I believe we should all recognize that the actions leading to the current MOU between Army and Interior were based on a perception of possible critical needs to be met immediately and, as such, the MOU was considered a temporary device for solving the immediate problem. The immediacy of the problem is somewhat obscure today since not one contract for delivery of water has been executed since the MOU went into effect on 24 February 1975.

We have always expressed reservations on the legality of the water marketing MOU as executed by the respective parties. We did agree, however, that the water to be marketed was surplus to irrigation needs in the near term and that pricing of diverted water could compensate

for lost power revenues. Over the long term, studies, evaluations, and reports should be consummated and recommendations forwarded to the Congress for implementing a water marketing program through a legislated project modification.

We question whether a simple request to basin states will yield a definitive assessment of industrial water needs; moreover, that such need should be supplied from the main stem system as the only alternative to be considered. We believe also that Indian Water Rights issues, including quantification, can not be supplied by BIA in the time frame outlined in your letter. Accordingly, only a full scale study, jointly conducted by the affected states and pertinent Federal agencies, can lead to a mutually agreeable solution. We recommend such an approach. Since the Corps of Engineers does in fact maintain, operate, and manage the system, it would be logical for the Corps to lead such an effort. A ready mechanism for coordinated studies—Federal and States—does exist in the Missouri River Basin Commission.

In summary, we recommend that the current Army-Interior MOU be allowed to expire and that discussions be initiated by our two Departments for undertaking the necessary pre-authorization studies outlined in this letter.

Sincerely,

/s/ C. A. Selleck, Jr.
C. A. SELLECK, JR.
Colonel, Corps of Engineers
Division Engineer

ADMINISTRATIVE RECORD 900204

Contract No. 9-07-60-WS048

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Pick-Sloan Missouri Basin Program

INDUSTRIAL WATER SERVICE CONTRACT BETWEEN THE UNITED STATES AND BASIN ELECTRIC POWER COOPERATIVE

THIS CONTRACT, Made this 28th day of December, 1978, pursuant to the Reclamation Act of 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, and the Flood Control Act of December 22, 1944 (58 Stat. 887), and the Memorandum of Understanding between the Secretary of the Interior and Secretary of the Army as executed on February 24, 1975, between the UNITED STATES OF AMERICA, hereinafter called the United States, acting for this purpose through the officer executing this contract, hereinafter called the Contracting Officer, and the BASIN ELECTRIC POWER COOPERATIVE, with its principal place of business at Bismarck, North Dakota, hereinafter called the Contractor;

* * * *

ADMINISTRATIVE RECORD 900225

Contract No. 0-07-60-WS057

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Pick-Sloan Missouri Basin Program

INDUSTRIAL WATER SERVICE CONTRACT BETWEEN THE UNITED STATES AND ANG COAL GASIFICATION COMPANY

THIS CONTRACT, Made this 9th day of November, 1979, pursuant to the Reclamation Act of 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, and the Flood Control Act of December 22, 1944 (58 Stat. 887), and the Memorandum of Understanding between the Secretary of the Interior and Secretary of the Army as executed on February 24, 1975, between the UNITED STATES OF AMERICA, hereinafter called the United States, acting for this purpose through the officer executing this contract, hereinafter called the Contracting Officer, and the ANG COAL GASIFICATION COMPANY, with its principal place of business at Detroit, Michigan, hereinafter called the Contractor;

* * * *

ADMINISTRATIVE RECORD 302599-601

UNITED STATES DEPARTMENT
OF THE INTERIOR
WATER AND POWER RESOURCES SERVICE
Washington, D.C. 20240

In Reply Refer To: 440 [Nov. 5, 1980]
840.

Memorandum

To: Assistant Secretary—Land and Water Resources

From: Commissioner /s/ (Illegible)

Subject: Missouri River Basin Water Marketing Program

This is in response to the September 23, 1980, memorandum from Acting Assistant Secretary—Land and Water Resources Daniel P. Beard.

Because of the intradepartmental differences that have arisen from numerous circulations of the Secretarial Issue Document (SID), which was primarily developed to extend the term of the Memorandum of Understanding (MOU) among the Secretary of the Interior, the Secretary of the Army, and the Secretary of Energy, we believe no further effort should be expended to resolve the corollary issues of Indian involvement raised by the Bureau of Indian Affairs and the pricing of water raised by the Assistant Secretary—Policy, Budget, and Administration and the Office of the Inspector General. We believe arduous and conscientious efforts to resolve all of these differences have been made.

As you may recall, this was the second item to be included on Water and Power's Code 115 Tracking System initiated November 27, 1978, to resolve crucial priority issues. From the beginning, see page 1 of the SID,

Water and Power has identified and the Solicitor has agreed that, ". . . the Secretary of the Interior has full legal authority to market industrial water from the main-stem reservoirs. . . ." The MOU has been and still is considered to be a ". . . highly desirable administrative device . . ." to clarify the several Federal agency roles. This was accomplished with the MOU that was executed by Army and Interior in 1975, and the MOU was later expanded to include the Department of Energy when it was created in 1976. Although that document expired December 31, 1978, we intend to follow as our policy the principles that were then established, e.g.,

1. Water and Power will continue to process all applications for industrial water from the main-stem reservoirs and will coordinate such applications with the State or States involved;

2. The Secretary of the Interior will contract for water service up to 1 million acre-feet which has been determined to be available for interim industrial uses from that identified for future irrigation use. Such uses will not impair the irrigation efficiency of the project pursuant to section 9(c)(2) of the Reclamation Project Act of 1939 (53 Stat. 1187);

3. Advise the Secretary of the Army of all contracts prior to their execution so that the Corps of Engineers can retain its operational and managerial controls over the main-stem reservoirs;

4. Allow the Secretary of Energy to review all contracts prior to their execution to ensure that the proposed industrial water service represents a beneficial use that should take precedence over hydroelectric power generation; and

5. Interior shall coordinate the lead responsibility for all site-specific industrial undertakings to ensure compliance with the National Environmental Policy Act.

We believe the foregoing principles will allow Water and Power to move forward with any applications for new or amendatory contracts. As you will recall, existing procedures permitted the execution of the master water service contract with the State of Montana in 1976, and the site-specific water service contract with the Basin Electric Power Cooperative in 1978 and the ANG Coal Gasification Company in 1979.

We received an official request from the State of Montana on June 17, 1980, to extend its master water service contract which will expire September 30, 1981. This contract is being negotiated and a *Federal Register* notice announcing our intent to amend the contract was published on July 29, 1980. The Upper Missouri Region has received inquiries from the Dryer Brothers for its proposed Circle West Project, the WESCO, and the Basin Electric Power Cooperative. Since all of these demands involve water from Fort Peck Reservoir they are being coordinated with the State of Montana pursuant to its master water service contract.

We believe the principles identified above are reasonably well-established and understood by the Departments of Army and Energy, and the Governors of the 10 Missouri River Basin States. To the extent that Indian resources may be involved, we will handle such requests on a case-by-case basis.

The periodic review of water service contract rates at 5-year intervals will accommodate adjusting future rates based on the current cost of replacement power plus the return of assigned water supply (ultimately for irrigation) capital costs with interest, annual operation, maintainance, and replacement costs, and contract administration costs. The initial rate for any new contracts or amendments for industrial water service will be premised on the above concepts. Such procedure is in line with

subsection 9(c)(2) of the Reclamation Project Act of 1939, i.e., rates are to be set so that they ". . . will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper. . . ."

As recommended by the Assistant Secretary—Policy, Budget, and Administration, and in the event that demand for water exceeds the quantity set aside for interim, industrial and related uses, we will consider pricing the water at market value by competitive bidding or some other acceptable procedure.

We agree with the views of the Deputy Solicitor—Program Coordination that there is no legal authority to share surplus revenues with the State or Indian tribes as stated in his September 5, 1980, memorandum to the Executive Secretary. Thus, our policy under any subcontract will be that the subcontract rate can be no higher than the Federal rate given in the master contract unless the non-Federal administrative costs are greater.

In summary and with your concurrence, we intend to continue water marketing activities from the main-stem reservoirs on the basis that (1) further extension of the MOU is not needed, (2) follow the principles previously established in the MOU as identified above, (3) adopt the ratemaking procedure for all new and amendatory contracts that utilize the current cost of replacement power plus the return of assigned water supply (ultimately for irrigation) capital costs with interest, annual operation, maintenance, and replacement costs, and contract administration costs, and (4) follow the advice of the Deputy Solicitor—Program Coordination that there is no legal authority to share surplus revenues earned from the water service contracts.

Concur.

/s/ Illegible
Assistant Secretary
Land and Water Resources
and Returned

Nov. 12, 1980
Date

cc: Regional Director, Billings, Montana
Regional Director, Denver, Colorado
Associate Solicitor—Energy and Resources
Field Solicitor—Billings, Montana
Wyoming Reclamation Representative,
Cheyenne, Wyoming
Kansas Reclamation Representative,
Topeka, Kansas

ADMINISTRATIVE RECORD 500696

AGREEMENT
FOR
SOUTH DAKOTA CONSERVANCY DISTRICT TO
ASSIGN A WATER RIGHT TO
ENERGY INDUSTRY USE
TO
ETSI PIPELINE PROJECT

INDEX

	Page
PARTIES	1
RECITALS	1
ARTICLE 1—DEFINITIONS	3
ARTICLE 2—ISSUANCE, ASSIGNMENT AND DEFENSE OF THE OAHE PERMIT	7
A. Issuance of Oahe Permit	7
B. Assignment of Oahe Permit	7
C. Defense of Oahe Permit	8
ARTICLE 3—PAYMENTS	8
A. Schedule of Payments	8
B. Payment for Failure to Construct West River Aqueduct	14
C. Late Payment	14
D. Method of Payment	15
E. Failure to Pay	15
ARTICLE 4—MADISON FORMATION AQUIFER	16
A. Wyoming Groundwater Permits	16
B. Agreement Not to Use Madison Formation Aquifer	16
C. Agreement Not to litigate Wyoming Groundwater Permits	17
D. No Prejudice Resulting from Agreements Not to Use Madison Formation Aquifer or Litigate Wyoming Groundwater Permits	17
ARTICLE 5—RIGHT OF WAY GRANT	18
ARTICLE 6—FEDERAL OAHE RESERVOIR PERMISSION	19

INDEX—Continued

	Page
ARTICLE 7—CONSTRUCTION AND FINANCING OF WEST RIVER AQUEDUCT	19
A. Construction and Maintenance	19
B. Bond Financing	20
C. No South Dakota Indebtedness	20
ARTICLE 8—TRANSPORTATION OF WATER THROUGH WEST RIVER AQUEDUCT FOR COMMUNITIES AND RURAL WATER SYSTEMS	21
A. Maximum Capacity	21
B. Transportation	21
C. Unused Capacity	23
D. No Third Party Rights	24
E. Separate Operating Entity	24
F. ETSI's Rights and Responsibilities	24
G. Abandonment of the West River Aqueduct	27
ARTICLE 9—DEVELOPMENT OF WATER RIGHT	
A. Use of Oahe Reservoir Water	28
B. Reversion of Unused Oahe Reservoir Water	29
ARTICLE 10—CONTRACT TERM	29
ARTICLE 11—CANCELLATION OR TERMINATION	30
A. Cancellation or Termination by Consent of Parties	31
B. Cancellation or Termination—Abandonment of Coal Slurry Pipeline	31
C. Cancellation—Use of Oahe Reservoir Water Prevented	31

INDEX—Continued

	Page
D. Cancellation Due to Pending Litigation	33
E. Cancellation—Alternate Water Source	35
F. General Right to Cancel	37
G. Termination for Fault	38
H. Cancellation—Oahe Permit	39
ARTICLE 12—FORCE MAJEURE	40
ARTICLE 13—LEGAL RELATIONSHIPS AND RESPONSIBILITY TO PUBLIC	41
A. Permits, Licenses and Taxes	41
B. Liability of ETSI	42
C. Liability of Public Officials, the SDCD and South Dakota	43
D. Amendment	43
ARTICLE 14—ASSIGNMENT; SALE OF OAHE RESERVOIR WATER	44
ARTICLE 15—GOVERNING LAW AND SELECTION OF FORUM	45
ARTICLE 16—SECURITY FOR PAYMENT	46
ARTICLE 17—REPRESENTATIONS AND WARRANTIES	47
A. ETSI	47
B. The SDCD and South Dakota	48
ARTICLE 18—NOTICES	48
ARTICLE 19—INTERPRETATION	49
A. References to Articles	49
B. Referenced Standards	49

INDEX—Continued

	Page
C. Effect of Headings	49
D. Joint and Several Liability	50
E. Entire Agreement	50
F. Time of the Essence	50
G. Binding on Successors and Assigns	50
ARTICLE 20—EXCLUSIVE REMEDY AND FORUM FOR MADISON LITIGATION	50
ARTICLE 21—NO THIRD PARTY BENEFICIARY RIGHTS	51
ARTICLE 22—ATTORNEY FEES AND COSTS	51
APPENDIX A—Assignment	
APPENDIX B—Sample Calculations of Indexed Payments	

PARTIES

THIS AGREEMENT made and entered into this 23rd day of December, 1981 (hereinafter referred to as the Effective Date) by and among ENERGY TRANSPORTATION SYSTEMS INC., a Delaware corporation, and ETSI PIPELINE PROJECT, a Joint Venture created as a partnership under the laws of Delaware, (said venture hereinafter referred to as "ETSI"), by and among ARCOAL TRANSPORTATION, INC., BECHTEL PETROLEUM, INC., LEHMAN REALTY CORPORATION, SLURCO CORPORATION, and TEXAS EASTERN SLURRY TRANSPORT COMPANY; the SOUTH DAKOTA CONSERVANCY DISTRICT (hereinafter referred to as "SDCD"); and the STATE OF SOUTH DAKOTA (hereafter referred to as "South Dakota").

WITNESSETH:

RECITALS

WHEREAS, prolonged and existing drought conditions in western South Dakota and water quality problems require the immediate provision of adequate and potable water supplies to communities and Rural Water Systems for human and animal consumption; and

WHEREAS, the unavailability of such water supplies endangers the economic viability of the agricultural industry in western South Dakota and the economy of South Dakota as a whole; and

WHEREAS, the continued use of existing water supplies containing radium, sulfates, iron, manganese, chlorides, fluorides and nitrates constitutes an immediate and chronic hazard to the health, safety and welfare of municipal and rural residents in the western portion of South Dakota; and

WHEREAS, South Dakota has recognized the water supply and quality problems of western South Dakota

communities and Rural Water Systems and has determined that such conditions may be alleviated or eliminated by supplying water from the Oahe Reservoir; and

WHEREAS, ETSI is willing to transport as additional consideration water owned by such communities and Rural Water Systems; and

WHEREAS, ETSI intends to construct one or more Aqueducts through western South Dakota for the transportation and beneficial use of Oahe Reservoir water into Wyoming or other states for Energy Industry Use in a quantity not to exceed fifty thousand (50,000) acre-feet per year; and

WHEREAS, ETSI also intends to construct the Coal Slurry Pipeline Project, which initially will appropriate and use approximately twenty thousand (20,000) acre-feet per year of said Oahe Reservoir Water for the transportation of coal from points in the State of Wyoming to various points in the United States, and ETSI also intends to complete the appropriation of approximately thirty thousand (30,000) acre-feet per year of Oahe Reservoir Water for a second Coal Slurry Pipeline or other Energy Industry Use; and

WHEREAS, the SDCD, pursuant to House Bill 1002, as enacted effective September 24, 1981, has filed an Application for Permit to Appropriate Water with the South Dakota Water Management Board for a permit to appropriate fifty thousand (50,000) acre-feet of Oahe Reservoir Water per year for Energy Industry Use, and intends to sell and assign such permit to ETSI for use within and outside South Dakota, and the SDCD and South Dakota deem such use of Oahe Reservoir Water by ETSI to be lawful; and

WHEREAS, Energy Transportation Systems Inc. has been granted the Wyoming Groundwater Permits to appropriate groundwater from the Madison Formation Aquifer, which ETSI and Energy Transportation Sys-

tems Inc. deem to be lawful and which South Dakota and the SDCD deem to be unlawful;

NOW, THEREFORE, for the consideration and upon the terms and conditions set forth herein, the parties do hereby mutually agree, as follows:

ARTICLE 1—DEFINITIONS

As used herein the following words and phrases shall mean:

Acre-foot. The volume of water that would cover one acre to a depth of one foot, equivalent to 43,560 cubic feet.

Alternate Water Source. Any source of water other than Oahe Reservoir water or water from the Madison Formation Aquifer as defined in this Agreement.

Application for Permit to Appropriate Water. Application for Permit to Appropriate Water within the State of South Dakota No. 1791-2 as filed by the SDCD with the Water Management Board.

Aqueduct. Any pipeline capable of transporting Oahe Reservoir Water.

Business Day. A calendar day other than a Saturday or Sunday or legal holiday under South Dakota law.

Coal Slurry Pipeline. Any pipeline capable of transporting coal slurry.

Coal Slurry Pipeline Project. The Coal Slurry Pipeline as described in the Final Environmental Impact Statement, Energy Transportation Systems Inc., issued by the United States Department of the Interior, Bureau of Land Management, July, 1981, as may be supplemented or amended.

Development Period. Ten (10) years from the date of this Agreement, being the period provided by SDCL Section 46-5-21, as amended.

Day or Date. Calendar day or date, unless otherwise specified. When used herein in connection with an order or other judicial or administrative action, the day of public filing of such order or other action, unless expressly provided otherwise.

Energy Industry Use. The use of water in an amount in excess of one thousand (1,000) acre-feet per year as a medium for carrying coal or other Energy Minerals, or in the extraction or refining of Energy Minerals.

Energy Industry User. A natural person, firm, partnership, association, syndicate, corporation, joint venture, public entity or state or federal agency using or supplying water for Energy Industry Use.

Energy Minerals. Any mineral fuel including, but not limited to, coal, lignite, petroleum, oil, natural gas, uranium and thorium and any combination of minerals used in the production of energy.

Fixed-Weighted Price Index for the Gross National Product. The fixed-weighted price index for the gross national product, as computed and published by the United States Department of Commerce in publication entitled "Survey of Current Business" or as published in any successor publication. The Fixed-Weighted Price Index for the Gross National Product is currently published in Table 7.1-7.2, and such index was 183.3 for 1980.

License Date. The first day a license is issued and delivered to ETSI pursuant to SDCL Section 46-5-30 for the Oahe Permit after completion of construction of physical works necessary to appropriate Oahe Reservoir Water for Energy Industry Use.

Madison Formation Aquifer. The Madison Formation Aquifer includes the Mississippian Age Madison Formation (commonly known as the Madison Formation, Pahasapa Formation, or Guernsey Formation)

and all hydraulically connected formations occurring between the top of the Precambrian basement rocks and the bottom of the Roundtop Shale (lower Minnelusa). The hydraulically connected formations included in this definition are the Madison Formation, Deadwood Sandstone, Red River Limestone, Fairbank or Bell Sand, and the Reclamation (lower Minnelusa) where they are present. The areal extent, for the purposes of this definition, shall be south of a line running east and west through the northern border of Powder River County, Montana, north of a line running east and west through the northern border of Platte County, Wyoming, and east of a line running north and south through the eastern border of Campbell County, Wyoming.

Oahe Permit. The permit issued to the SDCD by the Water Management Board as provided in ARTICLE 2 of this Agreement for the beneficial use of not more than fifty thousand (50,000) acre-feet of water per year to be used for a Coal Slurry Pipeline and other Energy Industry Use that is to be transported through the West River Aqueduct or any other Aqueduct constructed from Oahe Reservoir through South Dakota into Wyoming.

Oahe Reservoir Water. Water diverted pursuant to the Oahe Permit from that body of Missouri River water impounded by the Oahe Dam, Pick-Sloan Missouri River Basin Program, South Dakota.

Right of Way. Land, property or interest therein devoted to the West River Aqueduct.

Rural Water Systems. Those water distribution systems organized under SDCL Chapter 46-16, or defined by SDCL 10-36A-1 as in effect on the date of this Agreement and established to provide water for domestic and municipal uses.

Transfer Point. The pickup point immediately below the connection with the West River Aqueduct where the water diverted to a community or Rural Water System from said Aqueduct is measured and control is transferred to them.

Water Management Board. The State of South Dakota Water Management Board.

West River Aqueduct. A pipeline which is capable of transporting Oahe Reservoir Water through western South Dakota and into Wyoming.

Wyoming Groundwater Permits. Wyoming Permits to Appropriate Groundwater, Nos. U.W. 27854 through U.W. 27893, issued to Energy Transportation Systems, Inc.

ARTICLE 2—ISSUANCE, ASSIGNMENT AND DEFENSE OF THE OAHE PERMIT

A. *Issuance of Oahe Permit.* The SDCD shall be responsible for securing the issuance of the Oahe Permit from the Water Management Board.

B. *Assignment of Oahe Permit.* Within twenty (20) days after the Oahe Permit is issued, the SDCD shall sell and assign (in the form of Appendix A hereto) and deliver a copy of the Oahe Permit to ETSI for the term of this Agreement. Said assignment shall be without warranty or guarantee of any kind, express or implied, except the SDCD warrants that as of the time of the assignment it will not have theretofore assigned or encumbered said permit, and shall be subject to the terms, conditions and restrictions set forth in this Agreement.

C. *Defense of Oahe Permit.* The SDCD and South Dakota shall do those things reasonably within their power to perfect, protect, remedy and cure the Oahe Permit and its assignment to ETSI. After the Oahe Permit is assigned to ETSI, ETSI shall be jointly respon-

sible with the SDCD to defend the Oahe Permit, and the assignment thereof, in any proceedings against the SDCD or South Dakota or ETSI which may be brought before any court or administrative body contesting the validity of the Oahe Permit. The parties hereto agree that they shall cooperate with each other in any such litigation and that each shall have the right to intervene and defend the Oahe Permit and its assignment in any such proceedings.

ARTICLE 3—PAYMENTS

A. *Schedule of Payments.* In consideration of the rights and benefits afforded in this Agreement, ETSI shall pay to the SDCD the following amounts under the conditions stated below:

1. Two Million Dollars ($2,000,000) as provided under "a" or "b" below, whichever provision is applicable.

a. If the Oahe Permit is issued by the Water Management Board and the assignment of the Oahe Permit to ETSI is executed and delivered by the SDCD as provided in Paragraph B of ARTICLE 2, and the Oahe Permit and its assignment to ETSI are for fifty thousand (50,000) acre-feet of water per year and are free of all conditions or limitations other than those expressly provided for in this Agreement, then ETSI shall pay the SDCD Two Million ($2,000,000) upon the next Business Day following the execution and delivery of such assignment of the Oahe Permit by the SDCD; or

b. If the Oahe Permit is denied by the Water Management Board, or the SDCD does not execute the assignment of the Oahe Permit to ETSI as provided in Paragraph B of ARTICLE 2 within twenty (20) days after the issuance of the Oahe Permit to the SDCD, or the Oahe Permit or assignment are for less than fifty thou-

sand (50,000) acre-feet per year, or contain conditions or limitations in addition to those expressly provided for in this Agreement, then ETSI shall either pay the SDCD Two Million Dollars ($2,000,000) or cancel this Agreement by giving the SDCD notice of such cancellation within one of the following two time periods (i) prior to the expiration of the time in which the decision of the Water Management Board may be appealed, if the action of the Water Management Board is the reason for such cancellation; or (ii) within thirty (30) days after the issuance of the Oahe Permit to the SDCD, if the action of the SDCD is the reason for such cancellation.

In the event of cancellation by ETSI under this Paragraph A.1, the Oahe Permit shall revert to the SDCD and there shall be no other remedy for either party.

2. Unless this Agreement is cancelled as permitted hereby, an additional Two Million Dollars ($2,000,000) as provided under "a", "b" or "c" below, whichever provision is applicable.

a. If the issuance or assignment of the Oahe Permit is not appealed, then ETSI shall pay the SDCD Two Million Dollars ($2,000,000) by the fifth day following the expiration of the time for appeal of such issuance or assignment to a Circuit Court of South Dakota; or

b. If the issuance or assignment of the Oahe Permit is appealed to a Circuit Court of South Dakota, and no further appeal is taken from the Circuit Court decision on such appeal, then ETSI shall pay Two Million Dollars ($2,000,000) by the fifth day following the expiration of the time to appeal the decision of the Circuit Court to the South Dakota Supreme Court, unless ETSI has cancelled this Agree-

ment by giving the SDCD one of the following two notices:

(i) If no Circuit Court decision on such appeal is filed on or before March 31, 1982, then ETSI may give the SDCD notice of concellation no later than the date such a decision if filed; or

(ii) If, whenever such Circuit Court decision is filed, such decision invalidates or limits the Oahe Permit or its assignment to ETSI, then ETSI may give the SDCD notice of cancellation no later than five (5) days after the last date such decision may be appealed to the South Dakota Supreme Court.

c. If the Circuit Court decision on the issuance or assignment of the Oahe Permit is appealed to the South Dakota Supreme Court, then ETSI shall pay the SDCD Two Million Dollars ($2,000,000) on or before the fifth (5th) day following the date a decision by the South Dakota Supreme Court on such appeal is filed and becomes final, unless ETSI has cancelled this Agreement by giving the SDCD one of the following two notices:

(i) If no South Dakota Supreme Court decision on such appeal is filed and becomes final on or before October 1, 1982, then ETSI may give the SDCD notice of cancellation no later than the date such a decision is filed and becomes final; or

(ii) If, whenever such a South Dakota Supreme Court decision is filed and becomes final, such decision invalidates or limits the Oahe Permit or its assignment to ETSI, then ETSI may give the SDCD notice of

cancellation on or before the fifth (5th) day following the date such a decision is filed and becomes final.

In the event of cancellation by ETSI under this Paragraph A.2., the Oahe Permit shall revert to the SDCD, and ETSI's liability for payments shall be limited to any amount due the SDCD pursuant to Paragraph A.1. of this ARTICLE 3.

3. Unless this Agreement is cancelled as permitted hereby, an additional Three Million Dollars ($3,000,000) per year so that ETSI may pursue the appropriation of water for that year beginning on the first anniversary of the issuance of the Oahe Permit and continuing on each anniversary thereof, until such time as the payments described in Paragraph A.4. of this ARTICLE 3 are required to be commenced or the Development Period expires, whichever occurs first.

4. Unless this Agreement is cancelled as permitted hereby, Nine Million Dollars ($9,000,000) on the first field welding of the main coal slurry pipe of the Coal Slurry Pipeline Project. In addition, on each anniversary thereof so that ETSI may pursue the appropriation of water for that particular year, ETSI shall pay to the SDCD an amount adjusted according to the Fixed-Weighted Price Index for the Gross National Product according to the following formula: $A = 0.5\ B(1 + (C/D))$ where

A = amount of payment, provided that no payment shall ever be less than the immediately preceding payment.

B = Nine Million Dollars ($9,000,000) for the second payment under this Paragraph A.4., and thereafter the immediately preceding payment under this Paragraph A.4.

C = the Fixed-Weighted Price Index for the Gross National Product for the latest available calen-

dar year at the time of payment for which the Index has been published in the "Survey of Current Business" (or successor publication).

D = the Fixed-Weighted Price Index for the Gross National Product for the calendar year immediately preceding the calendar year applicable to "C", above.

In the event that the calculation of the Fixed-Weighted Price Index for the Gross National Product is altered or discontinued during the term of this Agreement, the parties agree to employ as a substitute that index published by any agency of the United States government which most closely reflects the assumptions, goals and methodology employed in the calculation of the Fixed-Weighted Price Index for the Gross National Product on the Effective Date of this Agreement. If the first payment under this Paragraph A.4. is made less than one year after the last payment under Paragraph A.3., there shall be credited against said first payment a prorata portion of said payment. If the Fixed-Weighted Price Index for the Gross National Product for a particular year is used in computing the amount of a payment and is then later revised by the United States Department of Commerce, no adjustment of that number shall be made as between the parties. Attached as Appendix B are sample calculations using the formula set out in this Paragraph A.4.

B. *Payment for Failure to Construct West River Aqueduct.* If, on or before July 1, 1984, for any reason whatsoever, including Force Majeure, ETSI has not constructed the West River Aqueduct so that communities and Rural Water Systems can have transportation of water, and ETSI has not, prior to that date, cancelled this Agreement pursuant to ARTICLE 3.A.1 or 3.A.2; or ARTICLE 11.C.4, then ETSI shall on July 1, 1984, pay to the SDCD the sum of One Million Five Hundred thousand Dollars ($1,500,000), which shall be the sole

remedy for such failure to construct and represents the amount agreed upon by the parties hereto as fair compensation for damages which are reasonably anticipated to be sustained by the SDCD and South Dakota as a consequence of such failure and not as a penalty.

C. *Late Payment.* In the event any amount payable by ETSI hereunder is not received by the SDCD on the date due, ETSI shall be liable for interest on such amount, from the date first due until the date received by the SDCD, at 125% of the prime rate charged by Citibank N.A. of South Dakota on ninety-day loans to their commercial borrowers of highest credit standing in effect on the date due. If the due date provided for herein shall fall on other than a Business Day, the due date shall be on the first Business Day following.

D. *Method of Payment.* All payments required of ETSI shall be made by certified or cashier's check and payable to the order of the SDCD. Payments shall be effective upon receipt of said check in the office of the Treasurer of the State of South Dakota. Alternatively, ETSI shall have the right to make payment by wire transfer or other mutually acceptable means.

E. *Failure to Pay.* The failure of ETSI to make any payment required by Paragraph A.2, A.3 or A.4 of this ARTICLE, after the passage of the ten (10) day period referred to in Paragraph G of ARTICLE 11, shall result in a cancellation of this Agreement. It will then be necessary for ETSI to determine whether the provisions of Paragraph B.1(a), (b) and (c) of ARTICLE 11, or the provisions of Paragraph E of ARTICLE 11 (provided that the Oahe Permit shall revert to the SDCD) shall be applicable to the cancellation. Such determination shall be made by the giving of notice by ETSI to the SDCD within fifteen (15) days after the end of said ten (10) day period, and a failure to give such notice shall be treated as if ETSI had given notice of cancellation under Paragraph B.1 of ARTICLE 11 on the last day of such period.

ARTICLE 4—MADISON FORMATION AQUIFER

A. *Wyoming Groundwater Permits.* Energy Transportation Systems Inc. has been issued the Wyoming Groundwater Permits to use and withdraw water from the Madison Formation Aquifer. By execution of this Agreement, ETSI and Energy Transportation Systems Inc. do not abandon said Wyoming Groundwater Permits, and the SDCD and the State of South Dakota do not recognize the validity of said permits. ETSI and Energy Transportation Systems Inc. represent that they have not been issued any other permits by the State of Wyoming to use or withdraw water from the Madison Formation Aquifer.

B. *Agreement Not to Use Madison Formation Aquifer.* ETSI and Energy Transportation Systems Inc. agree that so long as Oahe Reservoir Water is available to ETSI, they will not: (1) use or withdraw water from the Madison Formation Aquifer as provided in the Wyoming Groundwater Permits; nor (2) apply for or obtain any additional permits to use or appropriate water from the Madison Formation Aquifer; nor (3) sell, grant, assign, hypothecate, pledge or otherwise transfer any right, title or interest in the Wyoming Groundwater Permits other than for transfers between ETSI and Energy Transportation Systems Inc. None of the foregoing shall prohibit ETSI from doing work or testing necessary to comply with the due diligence requirements of Wyoming law as long as there is no impairment of pressure caused thereby in South Dakota ground water supplies. Oahe Reservoir Water shall be deemed to be available unless this Agreement has expired pursuant to ARTICLE 10, or has been cancelled or terminated pursuant to Paragraphs A.1. or A.2. of ARTICLE 3 or Paragraphs A, C, D or H of ARTICLE 11, or ARTICLE 12.

C. *Agreement Not to Litigate Wyoming Groundwater Permits.* Upon assignment of the Oahe Permit to ETSI

by the SDCD, and so long as ETSI and Energy Transportation Systems Inc. shall comply with the restrictions described in Paragraph B of this ARTICLE 4, the SDCD and South Dakota shall not seek any judicial or administrative relief, exercise any claim with respect to the Environmental Impact Statement (EIS) on the Coal Slurry Pipeline Project, or any other claim against ETSI or Energy Transportation Systems Inc. with respect to any proposed use of the Madison Formation Aquifer, pursuant to the Wyoming Groundwater Permits.

D. *No Prejudice Resulting from Agreements not to Use Madison Formation Aquifer or Litigate Wyoming Groundwater Permits.* If at any time Oahe Reservoir Water is not available to ETSI, as defined in Paragraph B of this ARTICLE 4, ETSI and Energy Transportation Systems Inc. shall be relieved of their obligations under said Paragraph B, and the SDCD and the State of South Dakota shall be relieved of their obligations under Paragraph C of this ARTICLE 4. In such event, none of the parties hereto shall be prejudiced in litigation, or otherwise, by having complied with their respective obligations set forth in this ARTICLE 4. In any litigation concerning the Madison Formation Aquifer, no party to this Agreement shall defend on the grounds or allege against any other party the claims of laches, delay, statute of limitations, estoppel, waiver or similar contentions, if any such defense or claim arises from compliance with the obligations of this Agreement. The rights of the parties under this Paragraph D shall survive any cancellation or termination of this Agreement.

ARTICLE 5—RIGHT OF WAY GRANTED

Energy Transportation Systems Inc. and ETSI agree that any transfer or assignment of the right of way grant issued to it for the Coal Slurry Pipeline Project by the United States Department of the Interior, Bureau of Land Management, shall be made expressly conditional

upon the acceptance by the transferee or assignee of the duties to be performed by ETSI or Energy Transportation Systems Inc. under this Agreement. ETSI and Energy Transportation Systems Inc. shall endeavor to cause notice thereof to be recorded in the proper federal office where the grant will be issued. ETSI and Energy Transportation Systems Inc. shall provide the SDCD with notice of any such transfer or assignment within ten (10) days thereof. This restriction shall not create any express or implied right of prior approval by the SDCD or South Dakota to such assignment or transfer.

ARTICLE 6—FEDERAL OAHE RESERVOIR PERMISSION

ETSI, at its sole cost and expense, shall be responsible for securing from the United States of America and its agencies any permission required for the storage, transportation or use of Oahe Reservoir Water, rights of way for construction of necessary facilities to divert the water and for construction of the West River Aqueduct, in accordance with this Agreement. The SDCD shall assist and cooperate with ETSI in securing such permission, and shall be entitled to participate in negotiations, hearings or other procedures required for securing said permission, including any relevant agency or court proceedings. ETSI shall provide the SDCD with timely notice of such negotiations, hearings and proceedings, and shall furnish the SDCD with copies of all legal or public filings in connection therewith.

ARTICLE 7—CONSTRUCTION AND FINANCING OF WEST RIVER AQUEDUCT

A. *Construction and Maintenance.* The West River Aqueduct shall be constructed, owned and operated by or for ETSI. The SDCD, South Dakota and ETSI shall cooperate with each other in connection with the construction of the West River Aqueduct. During construc-

tion ETSI shall maintain the right of way free of rubbish and excess materials, and shall restore any excavated surfaces, at its own cost and expense. ETSI shall provide the final plans and specifications for the West River Aqueduct to the SDCD for its information within thirty (30) days of their completion.

B. *Bond Financing.* ETSI shall have the right to finance the West River Aqueduct in any manner it sees fit. If requested by ETSI, SDCD shall use its best efforts, and do all things reasonably necessary to obtain tax-exempt financing agreeable to ETSI and the SDCD for constructing the West River Aqueduct, including, but not limited to, requesting an Internal Revenue Service ruling relating to the availability of such tax-exempt financing. ETSI shall pay all reasonable costs and expenses, including attorney's fees, necessary or incidental to obtaining any such tax-exempt financing which it has approved that are not paid out of bond proceeds. ETSI shall cooperate fully with the SDCD in securing such financing. Any failure to obtain a favorable Internal Revenue Service ruling or to secure tax-exempt financing shall not reduce, alter or otherwise affect any obligation of ETSI or Energy Transportation Systems Inc. under this Agreement.

C. *No South Dakota Indebtedness.* Any loan of the bond proceeds as provided in Paragraph B of this ARTICLE 7 shall be secured by such security as may be necessary to market the bonds. The bonds shall not constitute an indebtedness of South Dakota and shall not constitute nor give rise to a pecuniary or moral liability of South Dakota or charge against its general credit or taxing powers. No tax revenues of South Dakota, its people or any of its political subdivisions shall in any manner be obligated to pay for any portion of the construction or financing of the West River Aqueduct. Any bonds, indentures and related instruments shall be issued under terms and conditions mutually acceptable to the SDCD and ETSI.

ARTICLE 8—TRANSPORTATION OF WATER THROUGH WEST RIVER AQUEDUCT FOR COMMUNITIES AND RURAL WATER SYSTEMS

A. *Maximum Capacity.* In the absence of tax-exempt financing for the West River Aqueduct as provided in Paragraph B of ARTICLE 7, a maximum of four thousand three hundred (4,300) acre-feet of the total annual capacity of the West River Aqueduct shall be made available by ETSI for transportation of water without charge for local use by South Dakota communities and Rural Water Systems as provided for herein. If tax-exempt financing is used for the West River Aqueduct, the maximum capacity will be designated by those financing agreements, and such maximum shall be the minimum required in order to satisfy Internal Revenue Code requirements.

B. *Transportation.* Water owned by or provided by communities and Rural Water Systems shall be transported by ETSI from the point of diversion for Oahe Reservoir Water utilized by ETSI under the Oahe Permit through the West River Aqueduct. Any permits or licenses necessary for use of any water by South Dakota communities and Rural Water Systems shall be the sole responsibility of such South Dakota communities and Rural Water Systems, and ETSI shall have no obligation to provide any of the fifty thousand (50,000) acre-feet of Oahe Reservoir Water made available to it under the Oahe Permit to such communities and Rural Water Systems. The water shall be delivered at a total maximum rate for all Transfer Points combined of not more than six (6) cubic feet per second and at a design pressure for each Transfer Point of not more than forty (40) pounds per square inch absolute to a reasonable number of connections determined as follows:

1. On or before April 1, 1982, the SDCD shall develop and submit to ETSI in writing the size, loca-

tion and number of connections for Transfer Points from the West River Aqueduct to South Dakota communities and Rural Water Systems.

2. The information submitted by the SDCD shall be reviewed by ETSI, and if ETSI, in its best engineering judgment, determines that a connection for a Transfer Point as submitted by the SDCD will unreasonably impair the performance, or unreasonably increase the cost, of the connection of the operation and maintenance of the West River Aqueduct, ETSI shall have the option of relocating the connection, and ETSI shall be solely responsible for the direct additional costs to ETSI and the affected communities and Rural Water Systems caused by that relocation.

3. In order for ETSI to design its system in an orderly manner, the communities and Rural Water Systems whose water will be transported in the West River Aqueduct shall each enter into a standard written contract with ETSI consistent with this Agreement and setting forth the rights and obligations of the parties concerning the transportation of such water to such connection and the construction by the communities and Rural Water Systems of facilities necessary to use such water, *provided*, that if any such contract is not entered into by April 1, 1983, ETSI shall not be required to construct or transport water to any such Transfer Point. ETSI and the SDCD shall agree on the terms and conditions to be used in such contracts on or before August 1, 1982, and ETSI agrees thereafter to carry on good faith negotiations with the communities and Rural Water Systems.

C. *Unused Capacity.* Any portion of the total annual capacity of the West River Aqueduct set aside for use by communities and Rural Water Systems which is not utilized for the transportation of water from the

Oahe Reservoir to communities and Rural Water Systems as provided herein shall revert to ETSI. Any such reverted capacity shall again be made available to South Dakota communities and Rural Water Systems without transportation charge upon completion of any improvement of the West River Aqueduct resulting in increased capacity, or upon construction of any additional Aqueduct. In no event shall such reversion of capacity expand or enlarge ETSI's rights under the Oahe Permit.

D. *No Third Party Rights.* It is not intended hereby to create any third party beneficiary rights.

E. *Separate Operating Entity.* ETSI may create another entity to construct, own and/or operate the West River Aqueduct, and if it does so, the provisions hereof will also be assumed by said entity; *provided, however,* that the establishment of any such entity shall not reduce or relieve ETSI or Energy Transportation Systems Inc. of any of their obligations hereunder.

F. *ETSI's Rights and Responsibilities.* It is mutually acknowledged that the obligation of ETSI to transport water for the South Dakota communities and Rural Water Systems, as provided for herein, shall be subject to the following:

1. The water to be so transported shall be diverted from the Oahe Reservoir "as is" and ETSI shall have no duty to the SDCD, South Dakota, or to said communities or Rural Water Systems to upgrade the quality of the water. ETSI shall be entitled to mix corrosion inhibitors and drag reducers with said water, provided they will not impair the fitness for municipal use.

2. The quality of water transported by the West River Aqueduct will be the quality of water as same exists at the time first received by ETSI, with the normal and reasonable changes, if any, which will occur in the normal and ordinary transportation of

the water through a closed Aqueduct, under pressure, for the distance involved and subject to the last sentence of Paragraph F.1 above.

3. ETSI shall be responsible for all costs of construction, installation, operation and maintenance of connections at the Transfer Points for community and Rural Water Systems and for any and all related equipment and facilities, including valves and measuring devices. Community and Rural Water Systems water will be transported by ETSI, at ETSI's sole expense, to a measuring device at the Transfer Point, and the communities and Rural Water Systems will take custody of their water at the Transfer Point. ETSI shall cooperate in the physical connection of community and Rural Water Systems. The construction, installation, operation, maintenance and use of facilities and the treatment, storage, and distribution of community and Rural Water Systems water beyond the Transfer Point shall be the sole responsibility of the respective community and Rural Water Systems.

4. ETSI shall not be liable, either to the communities or Rural Water Systems, or to individual users, for interruption in the transportation of water resulting from causes not within ETSI's reasonable control. ETSI agrees to provide a policy of insurance in an amount of Five Million Dollars ($5,000,000) combined single limits, insuring liability for damage to property and/or injury to persons for each occurrence. In the event that ETSI has any liability hereunder for any failure to transport water as herein provided, whether sounding in contract or in tort, the total extent of ETSI's liability shall be limited to the proceeds collected under said insurance policy.

5. ETSI may close the West River Aqueduct, or segments thereof, for reasonable and necessary main-

tenance and repair without incurring any liability to communities or Rural Water Systems. Except in the case of emergency, reasonable advance notice of any intended closing of the West River Aqueduct, and of the anticipated length of such closing, will be given to the SDCD and all affected communities and Rural Water Systems. ETSI shall not be liable for closing the West River Aqueduct without such advance notice in the case of an emergency. In the event of an emergency requiring the closing of all or any part of the Aqueduct, ETSI shall provide notice of such closing to the SDCD and all affected communities and Rural Water Systems at the earliest practicable time, together with ETSI's best estimate as to the probable duration of such closing. In the event of any closing, ETSI shall promptly take appropriate action to restore the transportation of water through the West River Aqueduct at the earliest practicable time.

G. *Abandonment of the West River Aqueduct.* If at any time after construction of the West River Aqueduct by ETSI, ETSI determines to abandon operation of the West River Aqueduct for any reason, whether or not permissible under this Agreement, and including cancellation, termination or expiration of this Agreement, it is agreed that:

1. ETSI shall at the earliest practicable time provide the SDCD, South Dakota and all affected communities and Rural Water Systems with notice of said determination, specifying the effective date thereof; *provided, however*, that such notice shall in any event be given at least six (6) months prior to the date ETSI abandons operation of the West River Aqueduct. ETSI may withdraw said notice of abandonment at any time prior to the specified effective date thereof; *provided, further*, that ETSI may not thereafter abandon operation of the West River

Aqueduct without again providing notice in accordance with this Paragraph G.1.

2. ETSI shall continue to transport water to affected communities and Rural Water Systems for no less than six (6) months following the date of any notice given pursuant to Paragraph G.1 of this ARTICLE 8, regardless of whether ETSI is utilizing Oahe Reservoir Water for the Coal Slurry Pipeline Project or other Energy Industry Use.

3. Abandonment of operation of the West River Aqueduct shall be subject to the terms and conditions of this Agreement, and ETSI shall have no liability to the affected communities and Rural Water Systems by reason thereof.

4. If prior to the abandonment of operation of the West River Aqueduct, the SDCD and South Dakota cannot reach agreement with ETSI for purchase of the West River Aqueduct on mutually agreeable terms, the SDCD and/or South Dakota may exercise their rights of eminent domain to acquire the West River Aqueduct.

ARTICLE 9—DEVELOPMENT OF WATER RIGHT

A. *Use of Oahe Reservoir Water.* The parties understand that ETSI presently intends ultimately to complete construction of such facilities as are necessary to utilize beneficially up to fifty thousand (50,000) acre-feet per year of Oahe Reservoir Water in accordance with this Agreement within the Development Period. The parties agree that it may be necessary or desirable that such facilities be constructed in phases. ETSI presently intends and shall have the right to utilize approximately twenty-thousand (20,000) acre-feet per year of Oahe Reservoir Water transported through the West River Aqueduct for the Coal Slurry Pipeline Project. ETSI also presently intends and shall have the right within the

Development Period to use approximately thirty thousand (30,000) acre-feet of additional Oahe Reservoir Water transported through the West River Aqueduct or additional Aqueducts for a second Coal Slurry Pipeline or for other Energy Industry Use. The SDCD and South Dakota shall cooperate with ETSI in securing any approval necessary for such uses. No such use for other Energy Industry Uses shall be detrimental to South Dakota, the determination of which shall be governed by the standards set out in Paragraph 5 of ARTICLE 14. South Dakota has already approved the use of water under the Oahe Permit for the Coal Slurry Pipeline Project.

B. *Reversion of Unused Oahe Reservoir Water.* The right to appropriate that quantity of Oahe Reservoir Water not used by ETSI in the twelve consecutive months of greatest use during the Development Period shall revert, at the end of the Development Period, to South Dakota. Any such reversion shall not reduce, alter or otherwise affect any obligation of ETSI and Energy Transportation Systems Inc. under this Agreement. The sole remedy to the SDCD and South Dakota for ETSI's failure to utilize the full fifty thousand (50,000) acre-feet per year shall be the forfeiture by ETSI at the end of the Development Period of the right to any unused Oahe Reservoir Water.

ARTICLE 10—CONTRACT TERM

This Agreement shall be in effect from the Effective Date until fifty years from the License Date, unless otherwise terminated as provided herein. Upon expiration of this Agreement, all right, title and interest in the Oahe Permit shall revert to the SDCD, terminating any rights, privileges or duties of ETSI thereunder. This Agreement may be extended for such additional time as the parties hereto may agree in writing.

ARTICLE 11—CANCELLATION OR TERMINATION

A. *Cancellation or Termination by Consent of Parties.* This Agreement may be terminated or cancelled at any time upon the mutual agreement in writing of all parties hereto.

B. *Cancellation or Termination—Abandonment of Coal Slurry Pipeline.*

1. If at any time prior to the License Date, ETSI notifies the SDCD that it has abandoned all Coal Slurry Pipeline development for movement of Wyoming Coal, this Agreement shall terminate thirty (30) days after such notice. If prior to the License Date, ETSI ceases to exercise due diligence with respect to Coal Slurry Pipeline development, this Agreement shall be cancelled on the date that ETSI so ceases to exercise due diligence. For the purposes of this Paragraph B, it shall be conclusively presumed that ETSI has exercised due diligence during any calendar year that it has expended at least Five Million Dollars ($5,000,000) with respect to such development over and above any payments made to the SDCD under ARTICLE 3 of this Agreement. In the event of cancellation under this Paragraph B.1: (a) ETSI's liability for payments shall be limited to any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus any payments owing as provided in Paragraph B. of ARTICLE 3; (b) the Oahe Permit shall revert to SDCD; and (c) the prohibitions set forth in Paragraph B. of ARTICLE 4 pertaining to the Madison Formation Aquifer shall continue for fifty (50) years from the Effective Date of this Agreement.

2. If at any time on or after the License Date, ETSI abandons operation of all such Coal Slurry Pipelines, ETSI may cancel this Agreement on thirty

(30) days notice to the SDCD, and the requirements enumerated in Paragraph B.1. (a) through (c) of this ARTICLE 11 shall apply. If, notwithstanding such abandonment, ETSI does not so elect to cancel this Agreement, it may to the extent consistent with South Dakota law retain the Oahe Permit and continue to make the payments required under this Agreement. If for any reason the Oahe Permit is forfeited by ETSI under South Dakota law subsequent to said abandonment, the requirements of Paragraph B.1. (a) through (c) of this ARTICLE 11 shall apply.

C. *Cancellation—Use of Oahe Reservoir Water Prevented.* ETSI may cancel this Agreement by giving the SDCD notice of cancellation in the manner and for the reasons specified below:

1. If the United States of America or its agencies do not issue a decision on or before March 31, 1982, on any appropriate request by ETSI for federal permission required to utilize at least twenty thousand (20,000) acre-feet of Oahe Reservoir Water per year or required to obtain the necessary Federal Rights of Way for access to the Oahe Reservoir and construction of West River Aqueduct facilities on such Rights of Way, then ETSI may cancel by giving the SDCD notice of same. Any such notice shall be given no later than December 31, 1982, or the date of the decision on each respective request, which ever occurs first.

2. If the decision on any request specified in Paragraph C.1. of this ARTICLE 11 denies, invalidates or limits ETSI's ability to use at least twenty thousand (20,000) acre-feet per year of Oahe Reservoir Water, then ETSI may cancel by giving SDCD notice of same. Any such notice shall be given no later than December 31, 1982, or ten (10) days after the date of such decision, whichever occurs last.

3. If ETSI is unable, despite good faith efforts, to acquire the necessary South Dakota Right of Way for the West River Aqueduct, and, if there is pending or completed litigation involving the acquisition of the right of way which, if resolved unfavorably to ETSI would prevent ETSI's acquisition of the necessary right of way, then ETSI may cancel by giving the SDCD notice of same. Any such notice shall be given within ten (10) days after a decision of the South Dakota Supreme Court becomes final.

4. If at any time a final court or administrative order has been filed which invalidates the Oahe Permit or any federal approval described in Paragraph C of this ARTICLE 11, or which enjoins or specifically prohibits the use of Oahe Reservoir Water or South Dakota Rights of Way to the extent that at least twenty thousand (20,000) acre-feet per year of Oahe Reservoir Water cannot be used by ETSI for the Coal Slurry Pipeline Project, then ETSI may cancel by giving the SDCD notice of same. Any such notice shall be given no later than sixty (60) days after the date such order becomes final, meaning the last day on which such order may be directly reviewed or appealed to the next highest court or tribunal, whether by right or discretion, and such review has not been sought or such appeal taken.

In the event of cancellation under this Paragraph C: (a) ETSI's liability for payment shall be limited to any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus, if applicable, any payment as provided in Paragraph B of ARTICLE 3; and (b) the Oahe Permit shall revert to the SDCD.

D. *Cancellation Due to Pending Litigation.* If prior to the date of the first field welding of the main coal slurry pipe on the Coal Slurry Pipeline Project, any

court or administrative action other than direct appeals from original court or administrative actions described in ARTICLE 3 or Paragraph C of this ARTICLE 11 is pending which challenges the validity of the Oahe Permit or the ability to use Oahe Reservoir Water thereunder, ETSI may cancel this Agreement on thirty (30) days' notice to the SDCD, provided that:

1. Either ETSI, the SDCD, or South Dakota have brought on for hearing at the agency or trial court level, appropriate motions to dismiss, or for summary judgment or other summary disposition of such court or administrative action and such motions have been granted and appealed or have been denied, provided that if ETSI does not have standing to make such motions, and so informs the SDCD or South Dakota, the SDCD and South Dakota agree that if one or both do not make such motions in a timely manner, this condition specified in this Paragraph D.1 shall be deemed satisfied; and

2. ETSI reasonably concludes that such pending court or administrative action so jeopardizes its timetable and increases the cost of the Coal Slurry Pipeline Project that under the circumstances it is a prudent and reasonable decision to cancel this Agreement.

3. If the SDCD disagrees with ETSI that the condition in Paragraph D.2 has been satisfied and if litigation results, any such action shall be brought before and determined (subject to appeal) by the Circuit Court of Hughes County, South Dakota. If litigation is pending before the Circuit Court of Hughes County, South Dakota, and because thereof ETSI seeks to cancel under the terms of ARTICLE 11.D hereof (Cancellation Due to Pending Litigation) and thereafter there is litigation concerning such cancellation, it is mutually agreed that upon the request of either party, the parties hereto will

join in a motion to have said cancellation case assigned to a judge different from the judge to whom the said pending initial litigation was or is pending.

In the event ETSI elects to cancel this Agreement under this Paragraph D, then (a) ETSI's liability for payments owing shall be limited to any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus any payment as provided in Paragraph B of ARTICLE 3; and (b) the Oahe Permit shall revert to the SDCD.

E. *Cancellation—Alternate Water Source.* ETSI may cancel this Agreement at any time upon sixty (60) days notice to the SDCD that ETSI intends to use an Alternate Water Source for its Coal Slurry Pipeline Project, subject to the following:

1. The obligations and restrictions imposed upon ETSI and Energy Transportation Systems Inc. pursuant to Paragraph B of ARTICLE 4 shall survive any such cancellation and shall continue in full force and effect for fifty (50) years from the Effective Date of this Agreement;

2. In the event notice of such cancellation is provided by ETSI prior to the first use of Oahe Reservoir Water, ETSI's liability for payments in accordance with ARTICLE 3 shall be equal to the sum of:

a. Any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus

b. Any payment as provided in Paragraph B of ARTICLE 3, plus

c. Forty-Five Million Dollars ($45,000,000) *less* Nine Million Dollars ($9,000,000) times the number of payments previously paid by ETSI pursuant to Paragraph A.4. of ARTICLE 3 but not to exceed Forty-Five Million Dollars

($45,000,000) and to be paid without indexing in annual installments of Nine Million Dollars ($9,000,000) except for the last payment.

3. In the event notice of such cancellation is provided by ETSI subsequent to the first use of Oahe Reservoir Water, ETSI may elect to retain the Oahe Permit, in which event ETSI shall continue to be liable for annual payments to the SDCD in accordance with Paragraph A.4. of ARTICLE 3 for so long as ETSI shall continue to hold the Oahe Permit, or until the Oahe Permit is forfeited under South Dakota law. Should ETSI elect not to retain the Oahe Permit, the Oahe Permit shall revert to the SDCD, and ETSI's liability for payments in accordance with ARTICLE 3 shall be equal to the sum of:

a. Any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus

b. Any payment as provided in Paragraph B of ARTICLE 3, plus

c. Forty-Five Million Dollars ($45,000,000), *less* Nine Million Dollars ($9,000,000) times the number of payments previously paid by ETSI pursuant to Paragraph A.4. of ARTICLE 3 but not to exceed Forty-Five Million Dollars ($45,000,000) and to be paid without indexing in annual installments of Nine Million Dollars ($9,000,000) except for the last payment.

Nothing herein shall preclude ETSI from temporarily using an Alternate Water Source, but such temporary use shall not reduce, relieve or otherwise affect any obligation of ETSI or Energy Transportation Systems Inc. under this Agreement, nor will said temporary use result in a cancellation under this Paragraph E.

F. *General Right to Cancel.* ETSI may, in its discretion, cancel this Agreement at any time after it has

made the payments required under Paragraph A.1. and A.2. of ARTICLE 3, upon sixty (60) days notice to the SDCD. In the event of cancellation under this Paragraph F.: (a) ETSI's liability for payments shall be equal to the sum of:

(i) Any amounts which become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus

(ii) Any payment as provided in Paragraph B. of ARTICLE 3, plus

(iii) Forty-Five Million Dollars ($45,000,000), *less* Nine Million Dollars ($9,000,000) times the number of payments previously paid by ETSI pursuant to Paragraph A.4. of ARTICLE 3 but not to exceed Forty-Five Million Dollars ($45,000,000) and to be paid without indexing in annual installments of Nine Million Dollars ($9,000,000) except for the last payment.

(b) The Oahe Permit shall revert to SDCD; and (c) the prohibitions set forth in Paragraph B of ARTICLE 4 pertaining to the Madison Formation Aquifer shall continue for fifty (50) years from the Effective Date of this Agreement.

G. *Termination for Fault.* With the exception of default for failure to make payments provided for herein, if either party should default in the performance of any of the terms, conditions, or obligations assumed by them herein, then the other party shall first notify the defaulting party of the nature of such default, and thereafter the defaulting party shall have thirty (30) days to cure such default, or if such default is of such a nature that the same cannot reasonably be cured within thirty (30) days, the defaulting party shall have such additional time to cure as is reasonable under the circumstances and if such default is continuing thereafter the other party may pursue its remedies available for such default,

including, where applicable, voiding the transfer of the Oahe Permit or cancelling the Oahe Permit as provided in Section 4 of House Bill 1002 as enacted effective September 24, 1981. A party who fails to make a payment required in this Agreement shall have ten (10) days from the date of receipt of notice from the other party that such payment was due to cure such default, and if such default is continuing thereafter the other party may pursue its remedies available for such default.

H. *Cancellation—Oahe Permit.* If the Two Million Dollar ($2,000,000) payment becomes due and has been paid under the terms of Paragraph A.2 of ARTICLE 3, if ETSI by means of an independent certified audit establishes to the reasonable satisfaction of the SDCD, that ESTI has expended One Million Dollars ($1,000,000) after the Effective Date hereof in the development of the West River Aqueduct in right of way acquisition, engineering and other development costs, if ETSI is reasonably proceeding in good faith with its other obligations under this Agreement, and if despite such fact either party desires further substantiation of the quality and validity of the Oahe Permit and the ability of ETSI to legally use at least 20,000 acre-feet of water per year thereunder for the Coal Slurry Pipeline Project, then the parties shall work together to seek mutually acceptable remedial measures. If ETSI nevertheless determines on the basis of a written legal opinion in good faith that questions exist with respect to the quality and validity of the Oahe Permit and the ability to use water thereunder for the Coal Slurry Pipeline Project which are of such a serious nature as to materially jeopardize or impair financing or concluding transportation agreements with respect to the Coal Slurry Pipeline Project, then ETSI may cancel this Agreement by so notifying the SDCD not earlier than sixty (60) days nor later than one hundred twenty (120) days after the date of said payment. In the event of such cancellation: (a) ETSI's liability for payments shall be limited to any payments

which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus any payment as provided in Paragraph B of ARTICLE 3; and (b) the Oahe Permit shall revert to the SDCD.

ARTICLE 12—FORCE MAJEURE

Neither South Dakota nor the SDCD will be liable for damages nor be considered to be in default if performance of any obligation imposed on them by this Agreement cannot be performed because of Force Majeure as herein defined. Neither ETSI nor Energy Transportation Systems Inc. will be liable for damages nor be considered to be in default if performance of any obligation imposed on them by this Agreement cannot be performed because of Force Majeure; provided, however, that ETSI and Energy Transportation Systems Inc. shall exercise due diligence to remove such inability, and if they fail to do so, they shall be liable for damages resulting because of any such unreasonable delay. Force Majeure as used herein means such natural causes as failure of the Oahe Dam, failure of the West River Aqueduct because of earthquakes, slides or other casualties, or war, or valid legislative or other restraint of government such as a congressional prohibition against interstate movement of water or interbasin transfer of water. In addition, if ETSI's ability to use Oahe Reservoir Water is interrupted or impaired due to Force Majeure relating to the Oahe Reservoir or the West River Aqueduct for a period in excess of 120 days, ETSI may cancel this Agreement. In the event of cancellation under this ARTICLE 12: (a) ETSI's liability for payments shall be limited to any amounts which become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus any payment as provided in Paragraph B. of ARTICLE 3; and (b) the Oahe Permit shall revert to the SDCD.

ARTICLE 13—LEGAL RELATIONSHIPS AND RESPONSIBILITY TO PUBLIC

A. *Permits, Licenses and Taxes.* Except as otherwise provided in this Agreement ETSI shall procure all permits and licenses, obtain any and all necessary safety waivers, pay all charges, fees and taxes, and give all notices necessary and incidental to the due and lawful prosecution of this Agreement and ETSI shall defend, indemnify and hold harmless the SDCD and South Dakota and their representatives from any liability resulting from ETSI's failure to do so. Any interest, penalties, or other liabilities arising from such failure shall be solely for ETSI's account.

B. *Liability of ETSI.* ETSI shall indemnify, hold harmless, and protect the SDCD and South Dakota, their representatives, officers, employees, successors, and assigns, from all suits, actions or claims of any character brought because of any injuries or damage, personal or otherwise, received or sustained by any person, persons or property, including South Dakota-owned property, on account of any negligent act, omission or misconduct of ETSI, its representatives, officers, employees or agents; or because of any claims or amounts recovered from any infringements of patent, trademark or copyright, or from any claims or amounts arising or recovered under any "Workmen's Compensation Act", unemployment compensation statute, or comparable law; or from any claim or liability arising from or based on the violation of any other law, regulation, injunction, ordinance, order or decree; or from any liens or claims for which the SDCD or South Dakota might be or become liable, or to which SDCD or South Dakota property might be or become subject, which are chargeable to ETSI or any of its contractors, subcontractors, representatives, officers, employees or agents. This Agreement shall not be construed as a waiver of governmental immunity nor to create a new cause of action in any third parties.

C. *Liability of Public Officials, the SDCD and South Dakota.*

1. In carrying out any of the provisions of this Agreement, or in exercising any power or authority granted to them by or within the scope of the Agreement, there shall be no liability of any employees of the SDCD or South Dakota, or their authorized representatives, either personally or as officials of South Dakota, it being understood that in all such matters they act solely as agents and representatives of SDCD and/or South Dakota.

2. In the event of any occurrence for which ETSI has a specific right hereunder to terminate or cancel this Agreement, such termination or cancellation shall be ETSI's sole remedy for such occurrence, whether or not exercised, and such occurrence shall not give rise to any claim for damages against, or other liability on the part of, the SDCD or South Dakota. It is understood that in the event the SDCD or South Dakota breach this Agreement, under no circumstances whatsoever shall the SDCD or South Dakota be liable to ETSI or Energy Transportation Systems Inc. or any other party for damages, including lost profits or for any costs incurred in securing any replacement or substitute for Oahe Reservoir Water.

D. *Amendment.* No term or provision of this Agreement may be changed, waived, discharged or terminated, except by an instrument in writing signed by the party against which the enforcement of the change, waiver, discharge or termination is sought.

ARTICLE 14—ASSIGNMENT; SALE OF OAHE RESERVOIR WATER

ETSI shall have the unrestricted right to assign, sell or transfer this Agreement and the Oahe Permit and the unrestricted right to sell all or any part of its appropriated Oahe Reservoir Water pursuant to the Oahe Permit, subject to the following:

1. Any such assignee or transferee of this Agreement and the Oahe Permit shall be subject to all terms and conditions of this Agreement and the Oahe Permit and all purchasers shall use purchased water only in ways consistent with this Agreement and with the Oahe Permit as it is approved or is hereafter legally amended.

2. Any assignment, sale or transfer of this Agreement and the Oahe Permit, or any interest therein, or sale of Oahe Reservoir water shall not release ETSI or Energy Transportation Systems Inc. from any of their obligations under this Agreement.

3. If this Agreement and the Oahe Permit or any interest therein are assigned, sold or transferred, the assignee, purchaser or transferee must, as a condition to accepting such interest, agree in writing that it shall not make a new or increased use of water from the Madison Formation Aquifer for the same project for which it uses Oahe Reservoir Water for so long as it holds such interest; *provided, however,* that if the assignee, purchaser or transferee is using water from the Madison Formation Aquifer on the Effective Date of this Agreement, such use shall not be considered a violation of this provision.

4. If Oahe Reservoir Water is sold or transferred, the purchaser or transferee shall agree in writing that, unless it obtains the written consent of the SDCD, it shall not initiate any new use of water from the Madison Formation Aquifer for the same project for which it is using Oahe Reservoir Water for so long as it continues to use Oahe Reservoir Water for that project.

5. If on the date of a contract for the sale of Oahe Reservoir Water for Energy Industry Use by projects to be located in a state contiguous to South Dakota, South Dakota has in effect environmental

quality laws, as described below, which are more stringent than the otherwise applicable state or federal law, the purchaser shall agree to comply with said South Dakota environmental quality laws which set: (1) Air pollution emission standards for sulfur dioxide and designated hazardous air pollutants; and (2) water pollution standards for point-source discharges if the receiving waters flow into South Dakota.

ARTICLE 15—GOVERNING LAW AND SELECTION OF FORUM

This Agreement shall be governed in all respects by the law of South Dakota.

ARTICLE 16—SECURITY FOR PAYMENT

In the event ETSI cancels this Agreement pursuant to Paragraph E or F of ARTICLE 11, ETSI shall on the date of notice to the SDCD deliver to the SDCD an appropriate letter of credit, or other guarantee satisfactory to the SDCD, for the purpose of securing payment of all amounts then owed to the SDCD.

Should the SDCD require delivery of a letter of credit, after ETSI has made payments pursuant to Paragraph E or F of ARTICLE 11, the SDCD shall promptly give notice satisfactory to the issuing bank of reductions in the maximum amount secured.

The SDCD shall cancel the letter of credit and return the same to the issuing bank if:

1. The SDCD determines, upon the request of ETSI, that ETSI has sufficient assets to assure that payments which may be required under this Agreement can be paid and the SDCD approves cancellation of the letter of credit, said approval shall not be unreasonably witheld; or

2. ETSI has made all payments pursuant to Paragraphs E. or F. of ARTICLE 11; or

3. The letter of credit has expired on its own terms. Notices of reduction or cancellation shall also be given to ETSI.

Should the issuing bank become insolvent or breach any of the terms of said letter of credit, ETSI shall have thirty (30) days from the knowledge of such insolvency or breach to tender a substitute letter of credit or be in breach of this Agreement.

ARTICLE 17—REPRESENTATIONS AND WARRANTIES

A. *ETSI.* ETSI represents and warrants as of the effective date of this Agreement the following:

1. ETSI is a joint venture duly organized under the laws of the State of Delaware, and the joint venture partners will undertake to become duly qualified to do business in the State of South Dakota.

2. Energy Transportation Systems Inc. is a corporation duly organized and in good standing under the laws of the State of Delaware and will undertake to become duly qualified to do business in the State of South Dakota.

3. ETSI and Energy Transportation Systems Inc. have full power and authority to enter into this Agreement and to carry out the functions which they shall have undertaken in this Agreement.

4. All proceedings required to be taken by or on the part of ETSI and Energy Transportation Systems Inc. to enter into this Agreement have been duly taken. The execution of this Agreement by ETSI or Energy Transportation Systems Inc. will not violate any existing order, to wit, injunction or

decree of any court, administrative agency or governmental body.

B. *The SDCD and South Dakota.* The SDCD and South Dakota represent and warrant that all proceedings required to be taken by them have been taken to invoke their authority to enter into this Agreement and that the execution of this Agreement by the SDCD or South Dakota will not violate any existing order, writ, injunction or decree of any court, administrative agency or governmental body.

ARTICLE 18—NOTICES

All notices or other communications hereunder shall be in writing and any notice which invokes a right specifically afforded under this Agreement, including cancellation, termination or abandonment, shall specify the provision of this Agreement under which such notice is given and the grounds therefor. Notices shall be deemed duly given if delivered in person, telex, or by certified or registered mail, return receipt requested, first-class, postage prepaid to the person specified herein as entitled to receive such notice, or to their duly authorized representative, unless notice of a change of address is given pursuant to the provisions of this ARTICLE.

For the SDCD:
Secretary of the Department of Water and Natural Resources
Joe Foss Building
Pierre, South Dakota 57501

For South Dakota:
The Governor of the State of South Dakota
State Capitol Building
Pierre, South Dakota 57501

For ETSI:
President
ETSI Pipeline Project
P.O. Box 7598
San Francisco, CA 94120

For Energy Transportation Systems Inc.:	President Energy Transportation Systems Inc. P.O. Box 7598 San Francisco, CA 94120

The date of any such notice shall be the date of receipted as prescribed by this ARTICLE.

ARTICLE 19—INTERPRETATION

A. *References to Articles.* All references to articles, sections, or paragraphs, include all subarticles, subsections or subparagraphs under the article, section or paragraph reference.

B. *Referenced Standards.* All references specified by the number, symbol, or title of a reference standard shall comply with the latest edition or revision thereof and all amendments and supplements thereto.

C. *Effect of Headings.* The headings and titles to provisions contained herein are for convenience only, and shall not be deemed to modify or affect the rights and duties of parties to this Agreement.

D. *Joint and Several Liability.* The partners comprising the ETSI joint venture shall be jointly and severally liable for all obligations of ETSI under this Agreement.

E. *Entire Agreement.* This Agreement and the appendices attached hereto represent the entire agreement between the parties, and all previous communications, understandings, or agreements between the parties are hereby abrogated.

F. *Time of the Essence.* Time is of the essence in this Agreement, and any notices required hereunder, including notices of cancellation or termination, must be given within the times set forth in this Agreement, failing which the rights to be exercised pursuant to such notice shall be waived.

G. *Binding on Successors and Assigns.* This Agreement shall be binding upon and inure to the benefit of the parties hereto, their assigns and successors in interest.

ARTICLE 20—EXCLUSIVE REMEDY AND FORUM FOR MADISON LITIGATION

Wherever remedies or consequences for a particular breach or default are specifically provided under this Agreement, they shall be the sole and exclusive remedy or consequence available for such breach or default. It is mutually agreed that any action brought by the SDCD and/or South Dakota relating to a violation of the covenants and limitations on the use or withdrawal of water from the Madison Formation Aquifer shall be brought before and determined (subject to appeal) by the Circuit Court of Hughes County, South Dakota.

ARTICLE 21—NO THIRD PARTY BENEFICIARY RIGHTS

It is not intended hereby to create any third party beneficiary rights and only those who are parties to this AGREEMENT may maintain an action thereon.

ARTICLE 22—ATTORNEY FEES AND COSTS

In the event either party brings an action based on this contract, the prevailing party shall be reimbursed by the other party for all reasonable attorney's fees and expenses and court costs. If attorney's fees cannot be legally assessed against the SDCD or South Dakota, the amount of such fees fixed by agreement of the parties or by the court may be deducted by ETSI from its next payment hereunder. In any such action brought against the SDCD or South Dakota, ETSI shall provide notice of same to the Governor, Attorney General and Secretary of State of South Dakota.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and attested by

their duly authorized officers as of the date and year first above written.

SOUTH DAKOTA CONSERVANCY DISTRICT

By /s/ Robert L. Helmer
ROBERT L. HELMER
Chairman

ETSI PIPELINE PROJECT, A JOINT VENTURE

BY ARCOAL TRANSPORTATION, INC.

By /s/ H. E. Bond
President

THE STATE OF SOUTH DAKOTA

By /s/ William Janklow
WILLIAM JANKLOW
Governor

BY BECHTEL PETROLEUM INC.

By /s/ Illegible
Vice-President

BY LEHMAN REALTY CORPORATION

By /s/ Illegible
Vice-President

BY SLURCO CORPORATION

By /s/ Illegible

BY TEXAS EASTERN SLURRY
TRANSPORT COMPANY

By /s/ Illegible

ENERGY TRANSPORTATION
SYSTEMS, INC.

By /s/ Illegible
Attorney-in-fact

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ROBERT L. HELMER, who acknowledged himself to be the Chairman, of the Board of SOUTH DAKOTA CONSERVANCY DISTRICT, and that he, as such Chairman, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the SOUTH DAKOTA CONSERVANCY DISTRICT by himself as Chairman.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, WILLIAM JANKLOW, who acknowledged himself to be the Governor of the STATE OF SOUTH DAKOTA, and that he, as such Governor, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the STATE OF SOUTH DAKOTA by himself as Governor.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ———— ————, who acknowledged himself to be the ———— of ARCOAL TRANSPORTATION. INC., a corporation, and that he, as such ————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————— ————, who acknowledged himself to be the ———— of BECHTEL PETROLEUM, INC., a corporation, and that he, as such ————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————— ————, who acknowledged himself to be the ———— of LEHMAN REALTY CORPORATION, a corporation, and that he, as such ————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————— ————, who acknowledged himself to be the ———— of SLURCO CORPORATION, a corporation, and that he, as such ————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————————, who acknowledged himself to be the ———————— of TEXAS EASTERN SLURRY TRANSPORT COMPANY, a corporation, and that he, as such ————————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public, South Dakota

My Commission Expires: 4-7-83
[SEAL]

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————————, who acknowledged himself to be the ———————— of ENERGY TRANSPORTATION SYSTEMS INC., a corporation, and that he, as such ————————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public, South Dakota

My Commission Expires: 4-7-83
[SEAL]

APPENDIX A

FORM OF ASSIGNMENT AGREEMENT

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF _____)

KNOW ALL MEN BY THESE PRESENTS,

That, the SOUTH DAKOTA CONSERVANCY DISTRICT, a political subdivision of the State of South Dakota, in accordance with and subject to the terms and conditions of the Agreement by and among it, the STATE OF SOUTH DAKOTA, ENERGY TRANSPORTATION SYSTEMS, INC., and the ETSI PIPELINE PROJECT, a Joint Venture created as a partnership under the laws of Delaware by and among ARCOAL TRANSPORTATION, INC., BECHTEL PETROLEUM, INC., LEHMAN REALTY CORPORATION, SLURCO CORPORATION and TEXAS EASTERN SLURRY TRANSPORT COMPANY, executed the 23rd day of December, 1981, and for the considerations recited therein, does hereby grant, convey, sell, assign, transfer and set over unto the ETSI PIPELINE PROJECT, its right, title and interest under the permit issued to it by the South Dakota Water Management Board subject, to said Agreement, dated the 23rd day of December, 1981, to appropriate fifty thousand (50,000) acre-feet per year of Oahe Reservoir Water, a copy of said permit being attached hereto and incorporated herein by this reference. The SOUTH DAKOTA CONSERVANCY DISTRICT warrants that it has not heretofore assigned or encumbered said permit.

TO HAVE AND TO HOLD the same, to the ETSI PIPELINE PROJECT, and the ETSI PIPELINE PROJECT does hereby assume all obligations imposed under or in connection therewith.

IN WITNESS WHEREOF, the SOUTH DAKOTA CONSERVANCY DISTRICT has caused this assignment to be executed this — day of ————, 19—.

SOUTH DAKOTA CONSERVANCY DISTRICT

By ————————————

Robert L. Helmer, Chairman
Board of South Dakota
Conservancy District

Acceptance:

ETSI PIPELINE PROJECT

By ————————————,
(Title)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF ————)

On this the — day of ————, 198—, before me, the undersigned officer, personally appeared, ROBERT L. HELMER, who acknowledged himself to be the Chairman, of the Board of SOUTH DAKOTA CONSERVANCY DISTRICT, and that he, as such Chairman, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the SOUTH DAKOTA CONSERVANCY DISTRICT by himself as Chairman.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

————————————

Notary Public, South Dakota

My Commission Expires:
[SEAL]

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF ————)

On this the — day of ————, 198—, before me, the undersigned officer, personally appeared, ————, who acknowledged himself to be the ———— of ETSI PIPELINE PROJECT, and that he, as such ———, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of ETSI PIPELINE PROJECT by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

————————————

Notary Public, South Dakota

My Commission Expires:
[SEAL]

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
Washington, D.C. 20314

DAEN-CWP

Regulation
No. 1105-2-20 29 January 1982

Planning

PROJECT PURPOSE PLANNING GUIDANCE

* * * *

(6) *Water Rights.* Water rights necessary for the use of the stored water will not be acquired by the Corps but will be obtained as necessary by the water users. The Corps should not become involved in resolving conflicts among water users over the right to use stored water for water supply purposes, but will look to responsible state agencies to resolve such conflicts. Where more than one user is involved in the same project, it is desirable that arrangements be made with a single agency, if practicable, for payment and use of the entire water supply storage. Possible encroachment of the operation of water supply storage on the lawful water uses in the downstream areas will be carefully considered and fully coordinated with the responsible local interests as well as with the state agency responsible for the administration of water rights and water laws.

b. *Irrigation.* Storage of water of irrigation of agricultural lands, whether to meet the entire needs or to supplement natural supplies, may be considered in plan formulation.

(1) *Western States.* Section 8 of the Flood Control Act of 1944 provides that Corps lakes may include irrigation as a project purpose upon the recommendation of the Secretary of the Interior in conformity with reclamation law. Section 8 also provides that the Secretary of the Interior may provide needed irrigation works to

make use of irrigation storage. It is the Department of Interior's responsibility to construct, operate, and maintain the additional works needed to utilize irrigation storage. Section 8 applies only in the 17 Western States to which the reclamation law applies. When the project costs allocated to irrigation exceed the estimated amount that can be repaid to the United States by the water users, in accordance with reclamation law, the amount of the excess will be stated and appropriate reference made to the fact that special authorization by Congress is required for Federal projects in which the irrigation costs exceed the water-users' repayment ability.

(2) *Areas Outside the Western States.* The Corps may include irrigation storage in reservoirs in areas outside the 17 Western States provided the non-Federal entity assumes one-half of the costs of the reservoir capacity allocated to irrigation. This policy is analogous to the established Corps policy for reclamation by drainage. It is identical to the position adopted by the Department of Agriculture for reservoir capacity allocable to irrigation.

7-3. *Special Considerations Applicable to Water Supply.*

a. *Permanent Rights to Storage.* Under the authority of Public Law 88-140, local interests acquire a permanent right to the use of storage for which they have completed payments under an agreement with the government, as long as the space is physically available, taking into consideration equitable reallocations as necessitated by sedimentation. They must also agree to continue to pay their share of annual operation and maintenance (O&M) costs allocated to the water supply storage, together with their share of the costs allocated to any necessary reconstruction, rehabilitation, or replacement of any features which may be required to operate the project.

b. *Modification of Completed Projects.* Reallocation of reservoir storage that would have a significant effect

on other authorized purposes or that would involve major structural or operational changes requires Congressional approval. Providing the above criteria are not violated, 15 percent of total storage capacity allocated to all authorized project purposes or 50,000 acre feet, whichever is less, may be allocated from the storage serving authorized purposes to storage serving municipal or industrial water supply at the discretion of the Commander, USACE. The cost allocated to the local interests will be established as the highest of the benefits or revenues foregone, replacement cost, or the updated cost of storage in the Federal project.

(1) *Repayment Provisions.* The interest rate applicable to repayment contracts should be that computed in accordance with the Water Supply Act of 1958 for the fiscal year in which the contract is approved. Since requests for reallocation of storage should be within the context of satisfying immediate needs, the 10-year interest free period is not considered appropriate. The repayment period should be limited to the remaining physical life of the project, but not to exceed 50 years.

(2) *Cost Accounts.* All income and expenses (investment, operation, maintenance, and replacement) associated with the water supply function shall be separately identified in the official cost account record. When there is a loss of revenue of existing purposes, or additional operation and/or maintenance expense to existing purposes are incurred because of the new water supply addition, such charges shall be shown as a direct charge against the water supply function. This will effect the appropriate cost reductions in the existing project purposes and all revenues from the new addition will be credited to the new purpose. If hydropower revenues are being reduced as a result of the reallocation, excess water supply revenues should be credited as hydropower income.

c. *Surplus Water.* The term surplus water means water trapped or stored in a reservoir project which is

not utilized to fulfill an authorized project purpose. If surplus water is available in Corps projects, then by definition, there will be no benefits or revenues foregone nor will there by any value assigned to replacement storage. Therefore, under the authority provided by Section 6 of the Flood Control Act of 1944, the desired quantity of water should first be converted to an equivalent storage requirement. The annual cost of this storage to include operation, maintenance, and replacement payments should then be established in accordance with paragraph b above. Non-Federal interests would then be required to make annual payments of this amount for the right to withdraw the specified quantity of water.

ADMINISTRATIVE RECORD 930314

DA Permit
No. SD 2SB OXT 3 004234
ETSI Pipeline Project
Intake Structure
Missouri River Mile 1081.50R
(Lake Oahe)

FINDINGS OF FACT

* * * *

I. Any water-marketing agreements entered into between the Government and ETSI would be separate and distinct from the issuance of permits to ETSI to place an intake structure in the Oahe Reservoir. Consequently, questions relating to the authority of the Government to enter into such agreements are not properly a part of my public interest review of this permit application and are beyond the scope of that review.

* * * *

/s/ V. D. Stipo
V. D. STIPO
Colonel, Corps of Engineers
District Engineer

10 June 1982
Date

ADMINISTRATIVE RECORD 500929

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF RECLAMATION
Washington, D.C. 20240

IN REPLY
REFER TO: 440
840.

Jun. 22, 1982

Memorandum

To: Secretary of the Interior

From: Commissioner

Subject: Proposed Water Service Contract with the ETSI Pipeline Project, A Joint Venture for Use of 20,000 Acre-Feet of Lake Oahe Water Annually in a Coal Slurry Project—Pick-Sloan Missouri Basin Program, South Dakota

1. *Introduction*: Attached for your consideration and approval as to form is the proposed water service contract for 20,000 acre-feet of water service with the ETSI Pipeline Project, A Joint Venture (ETSI). ETSI's plan involves pumping water from Lake Oahe in South Dakota and transporting it by pipeline to a point near Gillette, Wyoming, mixing the water with coal mined in the Gillette area, and then transporting the slurry by pipeline to the middle Southern States for use in coal-fired, steam-electric generating facilities. The proposed contract has been prepared pursuant to Reclamation law, particularly section 9(c)(2) of the Reclamation Project Act of 1939 (53 Stat. 1187), and the Flood Control Act of 1944 (58 Stat. 887). Also attached are a copy of the Record of Decision signed by the Regional Director, Billings, Montana, and a fact sheet setting forth pertinent information concerning the proposed contract.

2. *Environmental Considerations and Public Participation*: Because ETSI's proposed coal slurry pipeline project involves crossing access on some 36 sections of federally owned lands in Wyoming, the Bureau of Land Management (BLM), was designated as the lead Federal agency for National Environmental Policy Act (NEPA) compliance. BLM completed its final environmental statement (FES 81-26) in July of 1981. A public comment period of 60 days was allowed and on January 14, 1982, BLM determined that NEPA compliance was complete and approved the ETSI project.

FES 81-26 was prepared based on the use of ground water from the Madison Formation as the primary water supply for the project. Water from Lake Oahe was identified as an alternate supply. Because of the potential impact (drawdown) on ground water from the Madison Formation and the opposition to the use of that water, ETSI selected Lake Oahe as its preferred water supply. The Bureau of Reclamation adopted BLM's FES 81-26 as an adequate site-specific environmental evaluation for the proposed water service contract action. Notification of this adoption was made in the *Federal Register* publication of October 23, 1981, which also announced the intent to begin contract negotiations with ETSI for water service from Lake Oahe. The 1977 comprehensive environmental impact statement "Water for Energy—Missouri River Reservoirs" (FES 77-43), detailing our overall water marketing program, covers the cumulative environmental effects, and FES 81-26 evaluates the specific ETSI project. We believe these studies constitute adequate NEPA compliance for the ETSI project.

The Environmental Assessment and Finding of No Significant Impact dated June 10, 1982, and signed by Colonel V. D. Stipo, District Engineer, Corps of Engineers, covering the proposed issuance of Department of the Army permits to ETSI under section 10 of the River and Harbor Act and section 404 of the Clean Water Act, for construction of a water intake structure

in Lake Oahe, Missouri River mile 1081.50R, are enclosed as additional NEPA compliance documentation for your consideration. To the extent that the overall analysis of impacts contained in the environmental assessment is relevant to the impacts associated with this proposed contract, it is adopted as updated and supplemental information to FES 77-43 and FES 81-26.

The Corps of Engineers' environmental assessment covers ETSI's application for an intake structure capable of pumping 54,300 acre-feet per year; however, it should be noted that the Bureau of Reclamation's proposed contract is for 20,000 acre-feet per year only and while the intake structure can ultimately handle more than 20,000 acre-feet per year, additional NEPA compliance by the Bureau of Reclamation would be required before it could enter into contracts for additional water for industrial use by ETSI. The Corps' environmental assessment concludes that neither the site-specific or downstream impacts of the Corps' actions are significant. Also, enclosed for your use and consideration are the Findings of Fact made by the Corps concerning the ETSI permit.

Concurrently with the *Federal Register* notice covering contract negotiations, a news release regarding the proposed contract was made from the regional office in Billings, Montana, to all major newspapers and radio and television stations throughout the Upper Missouri Region. The notice and news releases also announced a public meeting was to be held in Pierre, South Dakota, on November 24, 1981. The temporary furloughing of Federal employees on November 23, 1981, resulted in cancellation of that meeting, but it was rescheduled for December 10, 1981.

The coal slurry pipeline project as proposed by ETSI has been covered by media at the local, regional, and national levels for several years. Significant public interest was expected and received. About 40 copies of the draft contract were sent to interested parties before the public

meeting and about 50 more copies were distributed at the meeting. The format of the December 10 public meeting included an introduction on the purpose of the meeting, a background statement on the industrial water marketing program, and a summary of the draft contract, followed by a question and answer session. Those persons desiring to make a statement at the meeting were given the opportunity. Written statements were requested for the record, and the record for receipt of statements was officially open until January 10, 1982. Comments received through January 27, 1982, were included, however. Attached is a summary of the comments along with the applicable response.

3. *Contracting Entity and Legal Considerations*: ETSI, the official contractor, is a general partnership formed under the laws of the State of Delaware as shown below:

Partner	Percent of Ownership
Overseas Bechtel, Inc.	30
ARCO Transportation, Inc.	25
Slurco Corporation	20
Texas Eastern Slurry Transport Co.	20
Lehman Realty Corporation	5

ETSI was formed for the purpose of constructing, operating, and maintaining the proposed coal slurry pipeline project. This includes contracting for the water needs and construction of water pipeline facilities, contracting with coal suppliers, and contracting with the ultimate coal users at the coal slurry delivery points.

The Field Solicitor, Billings, Montana, and the Office of the Solicitor, Washington, D.C., have reviewed the proposed contract and find it legally sufficient. ETSI is considered to be an acceptable legal entity to contract with the United States. ETSI officials accepted the draft contract on February 23, 1982.

As provided by section 9(c)(2) of the Reclamation Project Act of 1939, we have concluded that the proposed

contract will not impair the irrigation efficiency of Oahe Reservoir, which is an integral part of the Pick-Sloan Missouri Basin Program (P-SMBP). As pointed out in the Solicitor's opinion of November 27, 1974, "Where because of changed circumstances it is not feasible to market, within the time periods originally contemplated, the amount of water available from the reservoir capacity provided for irrigation and the probable extent of future irrigation, you have not only the authority but, in my opinion, the responsibility as well, to apply that water to another beneficial use, such as municipal and industrial purposes." The proposed contract would provide for that interim beneficial use of the water while it is not being used for irrigation purposes.

That same opinion concluded that the decision as to whether it would be more beneficial to use the water for municipal and industrial purposes rather than for the supplemental generation of hydroelectric power would be a matter of sound administrative discretion. Officials of the Western Area Power Administration of the Department of Energy, expressed concern that the proposed water deliveries should not increase firm power rates or affect power availability. It is our position that revenues from the sale of water can be used to purchase replacement power where required by contractual obligations with power customers and where the need for such purchase can be demonstrated.

4. *Background:* Administrative procedures to handle industrial water marketing from the reservoirs built by the Corps of Engineers on the mainstem of the Missouri River were established by the February 24, 1975, Memorandum of Understanding (MOU) executed between the Secretary of the Interior and the Secretary of the Army. The MOU originally encompassed a 2-year term and was last extended through December 31, 1978. The final extension included the Secretary of Energy as a signatory party because of the establishment of the Western Area

Power Administration as the Federal power marketing agency for power generated at federally constructed hydropower facilities of the P-SMBP.

The water being provided for industrial use from the main-stem reservoirs is limited to 1 million acre-feet destined for future Federal irrigation units of the P-SMBP which are not scheduled for development for periods of 40 years or longer. The Solicitor's opinion of November 27, 1974, concluded that the Secretary of the Interior has authority to market such water for interim industrial purposes. The MOU established administrative procedures among the Federal Executive Departments involved with managing the main-stem dams and reservoirs and facilities of the P-SMBP. The administrative procedures, as set forth by our memorandum of November 5, 1980 (copy attached), are being followed even though the MOU has not been further extended or renewed.

In a special session on September 24, 1981, South Dakota enacted legislation to allow the ETSI project to proceed under State law. That legislation provided for issuance of a water permit to the South Dakota Conservancy District, the issuance of State revenue bonds to assist in financing the ETSI water pipeline, and the establishment of a water development fund. A contract was subsequently signed on December 23, 1981, among the State of South Dakota, the South Dakota Conservancy District, and ETSI. That contract provides for assignment of the water permit to ETSI, payments by ETSI into the State's water development fund, and agreement by ETSI not to use the Madison Formation aquifer for its coal slurry project. Governor William Janklow was the principal negotiator for South Dakota.

The South Dakota Water Management Board held three hearings on the water permit application. The water permit was granted to the South Dakota Conservancy District on February 4, 1982, and assigned to ETSI on February 9, 1982. The first payment of $2 million to

the water development fund by ETSI was made on February 11, 1982. The water permit and assignment document are attached to and made a part of the proposed contract.

Basically, South Dakota interests in providing Lake Oahe water for the ETSI project are: (1) The use of water from Oahe Reservoir removes the threat to western South Dakota communities that the Madison Formation aquifer would be overdrafted by ETSI; (2) Upon development of an acceptable contract for water service, communities and rural water users in western South Dakota will be allowed to obtain water from the ETSI waterline, thus providing water to an area of the State which has been without a good water source; and (3) South Dakota would receive substantial annual payments from ETSI for its water development fund to finance future water projects.

The attached letters from Governor William Janklow and the Speaker of the South Dakota House of Representatives demonstrate the endorsement of the proposed contract by South Dakota officials.

The Department's final action on the proposed contract will not be without controversy and opposition. States downstream of South Dakota, (Iowa, Nebraska, and Missouri) have expressed opposition to the proposed contract. These States have enjoyed the flood control and navigation benefits of a controlled Missouri River and now wish to continue this benefit. Even though the impact of providing water service to ETSI would be insignificant downstream, the Lower Basin States see the contract as a forerunner of other diversions. Opposition also has been expressed by the Indian tribes who continue to assert that their water rights should be quantified before any major use of water is allowed. Railroad interests are opposed to coal slurry projects on the basis that they have capacity to haul the coal. Environmental groups are opposed to diverting water out of the Missouri River Basin, to the coal slurry process as being untested,

and have also attacked the integrity of Bechtel Corporation, the major partner in the ETSI project.

We believe these arguments are not supportable. For example, the Bureau's water marketing program is currently limited to 1 million acre-feet, as covered by the 1977 comprehensive environmental impact statement, "Water for Energy—Missouri River Reservoirs." That study concluded that water use probably would not exceed 500,000 acre-feet annually because of other limiting factors such as air quality, social constraints, etc. Slurry pipeline transport of coal was one of the alternatives included in the scenarios developed to evaluate the cumulative environmental effects of the industrial activities stemming from the proposed water diversions.

Interior's water availability determination of February 24, 1975, and concurred with by the Corps of Engineers, was made following an intensive review of the water supply and other issues by representatives of the ten Missouri River Basin States. The Ad Hoc Committee Report dated July 1, 1974, shows that the States agreed that as much as 3 million acre-feet could be made available for the possible industrial undertakings. Copies of each of these documents are attached.

We believe the 1977 environmental study, the more recent BLM environmental statement, and the Corps' environmental assessment and Finding of No Significant Impact adequately cover the cumulative and site-specific environmental impacts associated with the proposed water use. We believe that there is no justification to deny the project because of adverse environmental effects. The concerns voiced by the railroad interests, and the Lower Basin States, are primarily political and social and need to be considered in light of the Upper Basin interests. For example, South Dakota gave up in excess of 500,000 acres for the construction of the main-stem dams and reservoirs and has received none of the Federal irrigation

development proposed to utilize storage water from these reservoirs. A contract provision that makes ETSI's rights to the use of water subservient to adjudicated water rights of the Indian Tribes in the area should adequately protect the interests of the Indian people.

5. *Contract Negotiations, Terms, and Conditions*: The proposed form of contract has been patterned after the forms of contracts approved for use with Basin Electric Power Cooperative and ANG Coal Gasification Company for industrial water service from Lake Sakakawea in North Dakota. These prior contracts were executed on December 28, 1978, and November 9, 1979, for up to 19,000 and 17,000 acre-feet of annual water service, respectively. These contracts, as well as the proposed contract with ETSI, contain provision that water use priority may be junior to claims and rights of the Missouri River Basin Indian Tribes when such claims and rights are adjudicated.

The term of the contract is 40 years with provision for renewal. It includes all the standard articles applicable to this type of contract. The proposed contract provides that satisfaction of South Dakota water law and permit requirements are a condition precedent to completing the contract.

Under the proposed contract, ETSI would receive an annual water entitlement for the beneficial use of up to 20,000 acre-feet for industrial purposes, including coal processing and preparation operations. ETSI obtains no holdover storage rights in Oahe Reservoir and may dispose of its interest in the contract only by assignment and approval of that assignment by the contracting officer. Water measurement would be required, and all facilities required for the diversion and beneficial use of the water would be non-federally funded and constructed. Also, ETSI must secure all easements, permits, licenses or leases for construction of diversion or pumping facilities on reservoir lands from the Corps of Engineers.

Concepts including the cost of purchasing replacement power from coal-fired, steam-electric generating plants and Federal debt servicing costs were used to establish the contract rate. The latter approach uses the assigned irrigation costs in the three main-stem reservoirs (Fort Peck, Garrison, and Oahe) to obtain the net cumulative unpaid balance at the interest rate in effect for 10-year United States Treasury Securities from the time the main-stem system investment became operational in the early 1960's through 1981. Under either approach, a water rate of about $30 per acre-feet can be supported.

The proposed contract provides for preservice (prior to project operation) and full water service charges, both subject to review and adjustment in calendar year 1985 and at 5-year intervals thereafter. The initial full water service charge is $30 per acre-foot and the preservice charge is 10 percent of that amount or $3 per acre-foot for the full 20,000 acre-foot entitlement. The preservice charge may be credited toward payment of the full service charge only in the year that water is first used. The time period for preservice payments is limited to 10 years or when the project becomes operational, whichever occurs first.

Annual operation and maintenance (O&M) costs incurred by the Bureau and the Corps of Engineers to make water deliveries are expected to be less than $2 per acre-foot, including the prorata share of the O&M costs of the mainstem reservoirs that are assigned to irrigation. Revenues would be credited toward paying these annual costs and any remainder would be credited toward repayment of specific irrigation cost assignments in the main-stem reservoirs. Following the payment of the specific irrigation cost assignments, the revenues would be used in conjunction with surplus power revenues to repay other reimbursable costs of the P-SMBP.

6. *Findings and Recommendations*: All prerequisites required to allow the water delivery to ETSI to proceed

under South Dakota law have been completed. The Governor of South Dakota, the South Dakota Legislature, and water users who stand to benefit from water deliveries in western South Dakota are solidly behind the proposed contract action. Review of the proposed contract in behalf of the Department of Energy was made by the Area Manager, Western Area Power Administration, Billings, Montana. The Secretary of the Army has been advised of the proposed contract so that the Corps of Engineers can retain operational and managerial control over the reservoir. Approval of the proposed contract will not be without public controversy. Opposition from the railroad interests, Indian tribes, States downstream of South Dakota, and certain environmental and special interest groups has been expressed and such expressions are expected to continue.

We believe the proposed contract is in the mutual best interests of the United States, the State of South Dakota, and ETSI, and we recommend that you approve the form of contract designated "UM Draft, Revised 3-3-82," with the understanding that minor contract revisions can be made, as necessary, to complete the contract for execution. Thereafter, pursuant to existing delegations of authority and after execution by ETSI officials, the Regional Director, Upper Missouri Region, will execute the contract in behalf of the United States and serve as contracting officer.

7. *Urgency of Approval*: The development of the ETSI coal slurry pipeline project has involved a number of years of intensive planning. According to ETSI officials, the water service contract is of utmost importance to its schedule to begin construction of the project. The standby service charge of $3 per acre-foot represents an annual sum to the United States of $60,000, or about $164 per day. Upon completion of the project, this

charge will increase to an annual amount of at least $600,000 per year.

/s/ R. N. Broadbent

Attachments

Approved:

/s/ James G. Watt — Jun. 29, 1982
Secretary of the Interior — Date

bc: Secretary's Surname
Secretary's Reading Files—LBR (2)
AS/LW (2)
Associate Solicitor—Energy and Resources
Chief, Division of O&M Technical Services, E&R Center
Regional Director, PN, MP, UC, LC, SW, UM, LM
Field Solicitor, Billings, Montana
W.O. Code 140
(w/o attachments)

RO Draft Revised
LBR:SSmith/FEEllis:1t:4/27/82:x35671
Revised:LBR:SSmith:1t:5/17/82:x35671
Revised:LBR:LMauro/AJones:1t:6/18/82:x35671
VReg/A8-15

ADMINISTRATIVE RECORD 900331

Duplicate Original
Contract No. 2-07-60-WS126

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Pick-Sloan Missouri Basin Program

INDUSTRIAL WATER SERVICE CONTRACT BETWEEN THE UNITED STATES AND ETSI PIPELINE PROJECT, A JOINT VENTURE

Table of Contents

Article No.	Title	No. Page
	Preamble	1
	Explanatory Recitals	1-2
1	Basic Conditions to Water Service Under this Contract	2
2	Term of Contract	2
3	Permits for Construction and Maintenance	2
4	Indian Water Rights—Availability of Water	3
5	Rate and Method of Payment for Water	3-4
6	Water Measurement and Responsibility for Distribution	4
7	Termination of Contract	5
8	Uncontrollable Forces	5
9	Conformance to State Laws and Policies	5
10	Standard Contract Provisions	5-6
11	Notice	6
	Signature Page	6
	Exhibit A	7-8-9

Duplicate Original
Contract No. 2-07-60-WS126

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Pick-Sloan Missouri Basin Program

INDUSTRIAL WATER SERVICE CONTRACT BETWEEN THE UNITED STATES AND ETSI PIPELINE PROJECT, A JOINT VENTURE

THIS CONTRACT, Made this 2nd day of July, 1982, pursuant to the Reclamation Act of 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, particularly Section 9(c) of the Act of August 4, 1939 (53 Stat. 1187), and the Flood Control Act of December 22, 1944 (58 Stat. 887), between the UNITED STATES OF AMERICA, hereinafter called the United States, acting for this purpose through the officer executing this contract, hereinafter called the Contracting Officer, and the ETSI PIPELINE PROJECT, A JOINT VENTURE, with its principal place of business at San Francisco, California, hereinafter called ETSI or the Contractor;

WITNESSETH:

WHEREAS, the following preliminary statements are made by way of explanation:

a. The United States, through its Corps of Engineers, has constructed and is operating the Oahe Dam and Reservoir in South Dakota (said reservoir being hereinafter called Lake Oahe) pursuant to Section 9 of the Flood Control Act of December 22, 1944.

b. ETSI is planning the construction and operation of a coal slurry pipeline from the Powder River Basin in Wyoming to serve electric utilities in the middle south-

ern states. The Contractor is in need of approximately 20,000 acre-feet of water annually as a coal transportation medium.

c. ETSI has secured assignment of the necessary conditional water permit from the South Dakota Conservancy District, covering an annual diversion for up to 50,000 acre-feet of water from Lake Oahe. Perfection of this water permit is a condition precedent for this contract. ETSI intends to request an additional water service contract from the United States as plans are developed to utilize the full 50,000 acre-feet of water per year covered in the water permit assigned from the South Dakota Conservancy District.

d. The Secretary of the Interior, hereinafter called the Secretary, and the Secretary of the Army have agreed that water service to industrial users can be provided out of the main stem reservoirs of the Missouri River, including Lake Oahe. The Secretary, after consultation with the Secretary of the Army, has determined that providing water service for industrial water use to ETSI for 20,000 acre-feet of water annually will not impair the efficiency of the project for irrigation, interfere with the operation of the project for flood control, nor adversely affect existing uses of water, and is a beneficial consumptive use of water.

e. The Bureau of Land Management, as designated lead agency for the Department of the Interior, has completed studies and filed the Final Environmental Statement (FES 81-26) dated July 1981 on the ETSI, Coal Slurry Pipeline Transportation Project pursuant to the National Environmental Policy Act of 1969 covering the effect on the environment of the construction and operation of facilities planned by ETSI. The Bureau of Land Management approved the project by record of decision dated January 14, 1982. The Department of the Interior's 1977 Comprehensive Environmental Impact

Statement, "Water for Energy—Missouri River Reservoirs" covering the Bureau of Reclamation's overall water marketing and the site-specific final environmental statement prepared by the Bureau of Land Management (81-26), constitute adequate National Environmental Policy Act compliance.

NOW, THEREFORE, in consideration of the premises and the mutual promises of the parties, it is agreed as follows:

BASIC CONDITIONS TO WATER SERVICE UNDER THIS CONTRACT

1. A condition precedent for this contract is the assignment of the water permit for energy industry use as authorized by Special Session of the South Dakota Legislature on September 24, 1981. This contract shall not be construed to extend to any water the diversion of which is not authorized by either South Dakota law or the State water permit. Should this water permit be forfeited or terminated for any cause by the State of South Dakota, this contract shall also be subject to termination. The above-described State water permit attached hereto is incorporated by reference.

TERM OF CONTRACT

2. This contract shall be effective on execution and shall continue for a term of 40 years unless sooner terminated under the provisions of this contract: *Provided*, That conditional upon the availability of water, the Contractor shall have the option to renew this contract pursuant to the Act of June 21, 1963 (77 Stat. 68; 43 U.S.C. 485h, note).

PERMITS FOR CONSTRUCTION AND MAINTENANCE

3. The Contractor shall secure from the Corps of Engineers all needed permits for the construction of diver-

sion or pumping facilities on lands under jurisdiction of the Corps, and all permits required under Section 10 of the Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), or under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 884; 33 U.S.C. 1344), in accordance with applicable regulations of the Secretary of the Army and the Corps of Engineers which may be in effect at the time of grant of an easement, permit, license, or lease: *Provided*, That such instruments will be subject to existing rights and the installation or installations by the Contractor shall be in accordance with plans approved by the Corps of Engineers and the Contracting Officer. It is further recognized that this contract or any subsequent instrument in connection therewith does not grant to the Contractor the right of access to the waters of Lake Oahe or to the Federal land adjoining for any purpose other than to make annual industrial use of 20,000 acre-feet of water service referred to in this contract.

. . . Explanatory Recitals
Article 1, 2, 3

INDIAN WATER RIGHTS—AVAILABILITY OF WATER

4. a. The parties to this contract acknowledge that American Indian Tribes claim prior and paramount rights to the use of large quantities of water within the Missouri River Basin. Accordingly, this agreement is subject and subordinate to any claims of the Missouri River Basin Indian Tribes for reserved rights to the use of water which are adjudicated and have been found to constitute a prior right by a final and nonappealable order of a court of competent jurisdiction.

b. During the term of this contract, and subject to conditions prescribed in Articles 1 and 4.a., and subject to any preexisting rights, the United States shall permit the Contractor to divert up to 20,000 acre-feet of water

annually from Lake Oahe in South Dakota for transport to the Powder River Basin in Wyoming and subsequently as the transportation medium in the coal slurry pipeline project. Water so diverted shall be in accordance, so far as possible, with schedules delivered by the Contractor to the Contracting Officer 90 days in advance of the proposed diversion of water. The Contractor will pay for such water service as provided below in Article 5.

c. The water furnished hereunder will be put to a beneficial use by the Contractor for industrial purposes and other uses incidental thereto, including coal processing and preparation operations. The Contractor will have no holdover storage rights in Lake Oahe. No sale, gift, delivery, or other disposition of the whole or any part of the 20,000 acre-feet of water to be made available annually by the United States will be delivered by the Contractor to third parties otherwise than by assignment of the Contractor's interest in this contract, as provided for in Standard Provision J of Exhibit A.

d. After water diversions have been made under this contract for a sufficient period of time for the Contractor to determine the definitive needs of the coal slurry pipeline project, the Contractor may request and the Contracting Officer will grant a reduction in the amount of water to be made available under Article 4b above if such reduction is made possible because of the Contractor's increased water use efficiency or because of the original overestimation of water needs. In the case of reductions in water entitlement, an appropriate and proportionate change will be made in the future payments required under Article 5 below. A reduction in the entitlement authorized under State water permit shall automatically reduce the amount of water to be made available under this water service contract.

RATE AND METHOD OF PAYMENT FOR WATER

5. a. The Contractor shall pay an annual preservice charge or full water service charge to the United States

for the water service entitlement provided under provisions of this contract. The preservice charge shall apply from the date of execution of this contract to the end of the construction period for the Contractor's proposed coal slurry project or 10 years, whichever is earlier. The full water service charge shall apply beginning with the tenth anniversary date of this contract or such earlier date as determined above.

Article 4
Article 5 . . .

b. Upon execution of this contract and on each yearly anniversary date thereafter when the preservice charge is applicable under provisions of this contract, the Contractor shall pay to the United States an annual preservice charge of 10 percent of the effective full water service charge times the 20,000 acre-feet of water proposed for diversion. The preservice charge provided herein shall be increased to a full water service charge under conditions set out in subparagraphs a and c of this Article 5. Should this contract be terminated for any cause by either the United States or the Contractor, all preservice charges paid to the United States by the Contractor shall become property of the United States.

c. The full water service charge from the effective date of this contract to the same date in 1985 shall be at the annual rate of $30 per acre-foot of water in full service status. Thereafter, and for each successive 5-year period, the water rate per acre-foot may be adjusted by the Contracting Officer in accordance with the then current rate-setting policies applicable to the Pick-Sloan Missouri Basin Program. Payment of the full water service charge shall be made in advance, on or before each anniversary date during the term of this contract when the full water service charge is applicable: *Provided*, That where water is used for construction purposes or for testing of pipeline facilities prior to initial diversions for project operation, a charge for each acre-foot used shall be paid to the

United States by the Contractor at the prevailing full service rate: *Provided further*, That during the periods when preservice charges are applicable and where a partial year of water service is provided for initial plant operation because of termination of the contract or any other reason, the Contractor shall pay the United States for actual water service provided at the prevailing full service rate per acre-foot of water used during such partial year of water service.

d. Nothing in this contract shall be construed to limit the State of South Dakota from assessing fees or charges for water appropriated by the Contractor pursuant to the State water permit referenced in Article 1.

WATER MEASUREMENT AND RESPONSIBILITY FOR DISTRIBUTION

6. a. Water diverted in accordance with Article 4 hereof will be measured by a metering device satisfactory to the Contracting Officer, installed, operated and maintained by the Contractor as required by the Contracting Officer and be accessible for inspection at all reasonable times by proper representatives of the United States.

b. All facilities required for the diversion and use of the water referred to in this contract shall be installed, operated and maintained at no expense to the United States. The Contractor shall hold the United States, its officers, agents, and employees harmless from any and all damages which may in any manner result from the operations of the Contractor in the diversion, use, or disposal of the water being provided under this contract.

. . . Article 5
Article 6

TERMINATION OF CONTRACT

7. a. Except as provided in Article 8 below, upon the failure of the Contractor to perform any of its obligations under this contract, the United States may give notice to

the Contractor in writing of the nature of its default and require the Contractor within a period specified in such notice, but not less than ninety (90) days, to correct its failure in compliance and upon Contractor's failure so to do, may terminate this contract or, at his/her sole election, the Contracting Officer may withhold water under the terms hereof until the Contractor complies with the terms of the contract. The Contractor shall have the right to terminate this contract in the event it has no further need for the water service contemplated by the terms herein.

b. If by the tenth anniversary date of this contract, the Contractor has not shown evidence that substantial construction is underway for the coal slurry project facilities proposed to utilize the water service herein provided, this contract may be terminated by the Contracting Officer upon giving 90 days' advance notice in writing to the Contractor.

c. Termination of this contract for any cause by either the United States or the Contractor shall not relieve the Contractor of any obligations incurred by way of this contract prior to termination.

UNCONTROLLABLE FORCES

8. Neither party shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of uncontrollable forces, the term "uncontrollable forces" being deemed, for the purposes of this contract, to mean any cause beyond the control of the party affected, including, but not limited to, drought, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight, such party could not reasonably have been expected to avoid. Either party rendered unable to fulfill any obligation by reason of uncontrollable forces shall

exercise due diligence to remove such inability with all reasonable dispatch.

CONFORMANCE TO STATE LAWS AND POLICIES

9. Nothing contained in this contract shall be construed to abridge, limit, deprive, or interfere with such rights as the State of South Dakota or any agency thereof now have either to the water subject to this contract, or to adopt such policies and enact such other laws as South Dakota deems necessary with respect to subject waters.

STANDARD CONTRACT PROVISIONS

10. This contract is subject to Standard Contract Provisions listed below and attached as Exhibit A which by this reference is made a part of this contract.

A. Charge for Late Payments

B. Contingent on Appropriation or Allotment of Funds

C. Books, Records and Reports

D. Title VI, Civil Rights Act of 1964

Article 7, 8, 9
Article 10 . . .

E. Quality of Water

F. Water and Air Pollution Control

G. Water Availability and Shortages

H. Rules, Regulations, and Determinations

I. Officials Not to Benefit

J. Assignment Limited—Successors and Assigns Obligated

K. Equal Opportunity

L. Water Conservation Program

NOTICES

11. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given, on behalf of the Contractor, when mailed, postage prepaid, or delivered to the Regional Director, Upper Missouri Region, Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103, and on behalf of the United States, when mailed, postage prepaid, or delivered to the ETSI Pipeline Project, A Joint Venture, P.O. Box 7598, San Francisco, CA 94120. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

IN WITNESS WHEREOF, the parties hereto have signed their names, the day and year first-above written.

UNITED STATES OF AMERICA

By /s/ Joseph B. Marcotte, Jr.
Regional Director
Upper Missouri Region
Bureau of Reclamation

ETSI PIPELINE PROJECT,
A JOINT VENTURE

By /s/ Wesley Witten

Title President

EXHIBIT A

A. CHARGE FOR LATE PAYMENTS

The Contractor shall pay a late payment charge on installments or charges which are received after the due date. The late payment charge percentage rate calculated by the Department of the Treasury and published quarterly in the *Federal Register* shall be used: *Provided*, That the late payment charge percentage rate will not be less than 0.5 percent per month. The late payment charge percentage rate applied on an overdue payment will remain in effect until payment is received or a different rate is published. The late payment rate for 30-day period will be determined on the day immediately following the due date and will be applied to the overdue payment for any portion of the 30-day period of delinquency. In the case of partial late payments, the amount received will first be applied to the late charge on the principal and then to payment of the principal.

B. CONTINGENT ON APPROPRIATION OR ALLOTMENT OF FUNDS

The expenditure or advance of any money or the performance of any work by the United States hereunder which may require appropriation of money by the Congress or the allotment of funds shall be contingent upon such appropriation or allotment being made. The failure of the Congress to appropriate funds or the absence of any allotment of funds shall not relieve the Contractor from any obligations under this contract. No liability shall accrue to the United States in case such funds are not appropriated or allotted.

C. BOOKS, RECORDS, AND REPORTS

The Contractor shall establish and maintain accounts and other books and records pertaining to its financial transactions, land use and crop census, water supply, water use,

changes of project works, and to other matters as the Contracting Officer may require. Reports thereon shall be furnished to the Contracting Officer in such form and on such date or dates as he may require. Subject to applicable Federal laws and regulations, each party shall have the right during office hours to examine and make copies of each other's books and records relating to matters covered by this contract.

D. TITLE VI, CIVIL RIGHTS ACT OF 1964

1. The Contractor agrees that it will comply with Title VI of the Civil Rights Act of July 2, 1964 (78 Stat. 241), and all requirements imposed by or pursuant to the Department of the Interior Regulation (43 CFR 17) issued pursuant to that title, to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Contractor receives financial assistance from the United States and hereby gives assurance that it will immediately take any measure to effectuate this agreement.

2. If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Contractor by the United States, this assurance obligates the Contractor or in the case of any transfer of such property, any transferee for the period during which the real property or structure is used for a purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance obligates the Contractor for the period during which it retains ownership or possession of the property. In all other cases, this assurance obligates the Contractor for the period during which the Federal financial assistance is extended to it by the United States.

3. This assurance is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts, or other Federal financial assistance extended after the date hereof to the Contractor by the United States, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Contractor recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall reserve the right to seek judicial enforcement of this assurance. This assurance is binding on the Contractor, its successors, transferees, and assignees.

E. QUALITY OF WATER

The operation and maintenance of project facilities shall be performed in such manner as is practicable to maintain the quality of raw water made available through such facilities at the highest level reasonably attainable as determined by the Contracting Officer. The United States does not warrant the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

F. WATER AND AIR POLLUTION CONTROL

The Contractor, in carrying out this contract, shall comply with all applicable water and air pollution laws and regulations of the United States and the State of South Dakota and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

G. WATER AVAILABILITY AND SHORTAGES

1. The United States will not be responsible for the control, carriage, handling, use, disposal, or distribution

of water furnished the Contractor hereunder, and the Contractor will hold the United States and its officers, agents, and employees harmless on account of damage or claim of damage of any nature whatsoever arising out of or connected with the control, carriage, handling, use, disposal, or distribution of water by the Contractor.

2. The United States shall not be responsible for the maintenance of any particular water level in order to permit the Contractor to take water therefrom through the facilities which the Contractor installs. Payments shall be due and payable as provided in Article (5), irrespective of the Contractor ability or inability to take water.

3. On account of uncontrollable force, there may occur in any year a shortage in the total annual quantity of water available for furnishing to the Contractor by the United States pursuant to the contract. In no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage direct or indirect arising from such shortages. In the case of such shortage, an appropriate reduction shall be made in the water service charge for that year.

H. RULES, REGULATIONS, AND DETERMINATIONS

1. The Contracting Officer shall have the right to make, after an opportunity has been offered to the Contractor for consultation, rules and regulation and the State of South Dakota to add or to modify them as may be deemed proper and necessary to carry out this contract, and to supply necessary details of its administration which are not covered by express provisions of this contract. The Contract shall observe sucl rules and regulations.

2. Where the terms of this contract provide for action to be based upon the opinion or determination of either

party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations. In the event that the Contractor questions any factual determination made by the Contracting Officer, the findings as to the facts shall be made by the Secretary only after consultation with the Contractor and shall be conclusive upon the parties.

I. OFFICIALS NOT TO BENEFIT

1. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom. This restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

J. ASSIGNMENT LIMITED—SUCCESSORS AND ASSIGNS OBLIGATED

The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this contract or any part of interest therein shall be valid until approved by the Contracting Officer.

K. EQUAL OPPORTUNITY (FEDERAL CONSTRUCTION)

During the performance of this contract, the Contractor agrees as follows:

1. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, or

national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

2. The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without discrimination because of race, color, religion, or national origin.

3. The Contractor will send to each labor union or representative of workers, with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

4. The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

5. The Contractor will furnish all information and reports required to said amended Executive Order by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the Contracting Officer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

6. In the event of the Contractor's noncompliance with the nondiscrimination clause of this contract or with any of the such rules, regulations, or orders, this contract may be canceled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further government contracts in accordance with procedures authorized in said amended Executive Order, and such other sanctions may be imposed and remedies invoked as provided in said Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

7. The Contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of said amended Executive Order, so that such provisions will be binding to each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such programs, including sanctions for noncompliance: *Provided, however,* That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

L. WATER CONSERVATION PROGRAM

While the contents and standards of a given water conservation program are primarily matters of State and local determination, there is a strong Federal interest in developing an effective water conservation program because of this contract. The Contractor shall develop and implement an effective water conservation program for all uses of water which is provided from, or conveyed through, federally constructed or federally financed fa-

cilities. That water conservation program shall contain definite goals, appropriate conservation measures, and time schedules for meeting the water conservation objectives.

A water conservation program, acceptable to the Contracting Officer, shall be in existence prior to one or all of the following: (1) service of federally stored/conveyed water; (2) transfer of operation and maintenance of the project facilities to the Contractor; or (3) transfer of the project to an operation and maintenance status. The distribution and use of federally stored/conveyed water and/or the operation of program facilities transferred to the Contractor shall be consistent with the adopted water conservation program. Following execution of this contract, and at subsequent 5 year intervals, the Contractor shall submit the water conservation plan to the Contracting Officer for review and approval. After review of the results of the previous 5 years and after consultation with the Contractor, the Contracting Officer may require modifications in the water conservation program to better achieve program goals.

No. 1791-7

Map No. 1545-Z Water District No. 2
Lower Cheyenne District

Above for Office Use

APPLICATION FOR PERMIT

To Appropriate Water within the State of South Dakota

Check one of the following:

New X Vested Right —— Future Use ——
Change in Diversion —— Additional Diversion ——
Change in Acreage —— Additional Acreage ——

1. Name of Applicant South Dakota Conservancy District Phone No. 773-3151
   Post Office Address Foss Building, Pierre State South Dakota 57501
   If a corporation show date and place of incorporation ——————
2. Method of accomplishing work (contract, employment of others, or by direct labor) contracts
3. Name of diversion work West River Aqueducts
4. Amount of water claimed (cubic feet per second) 50,000 acre-feet annually
5. Source of water supply Missouri River—Oahe Reservoir storage
6. Location of point of diversion Along West shoreline of the Oahe Resevroir somewhere between the two shoreline points located in SW 1/4 of section 31, T7N, R29E and NW 1/4 of section 31, T6N, R31E, County Stanley
7. Annual period or periods during which water is to be used continuously

8. Use to be made of water, (irrigation, industrial, municipal, commercial, recreation, etc.) Energy industry use

9. For irrigation use. Total number of acres to be irrigated ————————

List below each forty acre subdivision, or lot, or fraction thereof and show number of acres to be irrigated in each

Attach sheet if more space is needed

10. Time required to complete construction of water supply system 10 years. Additional time required to complete application of water to the proposed beneficial use 0 years.

11. Choice of county newspaper for publication of Notice of Intent to Appropriate Water Fort Pierre Times-Capitol Journal-Pierre Argus Leader-Sioux Falls Journal-Rapid City

12. Principal Features of the Proposed Water Supply System.

A. Works proposed to divert water from its natural source.
Intake pump station

B. Works proposed to transport water to place of use.

Buried pipeline with necessary booster pump stations, controls, powerlines, and appurtenances. (Reference: Environmental Impact Statement, ETSI, Bureau of Land Management)

C. Works proposed to apply water to beneficial use. Coal slurry pipelines and other energy industry use beginning in the Powder River Basin, Wyoming.

Estimated Total Cost $250,000,000 per aqueduct.

Attachments: Attach Form 2A if diversion from a well or dugout, or if storage of water, is proposed. Attach map.

(see instructions concerning preparation.)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Robert L. Helmer, the applicant, certify that I have read the foregoing application and have examined the attached map and that the matters therein stated are true and that I intend and am able to complete the necessary construction.

/s/ Robert L. Helmer
Subscribed and sworn to before me this 25th day of September 19—.

/s/ [Illegible]
Notary Public (or other qualified officer).

WNR-802-7/79

WATER RIGHT APPLICATION APPROVAL

The Water Management Board hereby approves Water Right Application No. 1791-2, South Dakota Conservancy District, Foss Building, Pierre, South Dakota 57501 With the following qualifications.

This Permit is approved in accordance with the ETSI contract and Conclusions of Law and Findings of Fact leading to the final decision, and hereby made a part of this permit.

Date of first receipt of application *September 25, 1981*

Date of return to applicant for correction, amendments or changes required ————, 19—

Date of receipt of correction application ————, 19—

Approved *February 4*, 1982, Recorded in Book *22* Page *335*

WATER RIGHT PERMIT NO. 1791-2

The Water Management Board hereby grants and issues this Water Right Permit No. 1791-2 authorizing the construction of the water use system and the putting of water to beneficial use as stated in the Application and as qualified in the Water Right Application approval, subject, however, to the following limitations and conditions:

1. The date from which applicant may claim right is September 25, 1982
2. The equivalent of at least one-fifth of the work above specified is to be completed on or before February 4, 1987
3. The whole of said work is to be completed on or before February 4, 1992
4. The limit of time from proof of beneficial use of water appropriated in accordance herewith is February 4, 1992

5. The water appropriated shall be used for the purpose of Energy Industry Use

6. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

7. The amount of the appropriation herein granted shall not exceed 50,000 acre feet of water annually, neither shall it exceed the capacity of the above described water supply system, nor shall it exceed the amount of water needed for beneficial uses served, and is actually and beneficially used for energy industry use on or before February 4, 1992; said water to be used during the following described annual period: continuously.

Witness my hand this 5th day of February, 1982.

THE WATER MANAGEMENT BOARD

By: /s/ John Hatch
Chief Engineer, Water Rights

Certificate of Construction Issued ————, 19—

Water License Issued ————, 19—

ADDENDUM TO APPLICATION FOR PERMIT TO APPROPRIATE WATER

This application is for a permit to appropriate water for energy industry use for marketing by the South Dakota Conservancy District (District) to Energy Transportation Systems, Inc. (ETSI), a Delaware corporation, a related corporation or entity, or successor in interest to effectuate the terms of a contract or instrument of conveyance to be executed by and between the District and ETSI or such related corporation or entity prior to the approval of the application and issuance of a permit.

ASSIGNMENT AGREEMENT BETWEEN SOUTH DAKOTA CONSERVANCY DISTRICT AND ETSI PIPELINE PROJECT

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

KNOW ALL MEN BY THESE PRESENTS.

That, the SOUTH DAKOTA CONSERVANCY DISTRICT, a political subdivision of the State of South Dakota, in accordance with and subject to the terms and conditions of the Agreement by and among it, the STATE OF SOUTH DAKOTA, ENERGY TRANSPORTATION SYSTEMS, INC. and the ETSI PIPELINE PROJECT, a Joint Venture created as a partnership under the laws of Delaware by and among ARCOAL TRANSPORTATION, INC., BECHTEL PETROLEUM, INC., LEHMAN REALTY CORPORATION, SLURCO CORPORATION and TEXAS EASTERN SLURRY TRANSPORT COMPANY, executed the 23rd day of December, 1981, and for the considerations recited therein, does hereby grant, convey, sell, assign, transfer and set over unto the ETSI PIPELINE PROJECT, its right, title and interest under the permit issued to it by the South Dakota Water Management Board subject to said Agreement, dated the 23rd day of December, 1981, to appropriate fifty thousand (50,000) acre-feet per year of Oahe Reservoir Water, a copy of said permit being attached hereto and incorporated herein by this reference. The SOUTH DAKOTA CONSERVANCY DISTRICT warrants that it has not heretofore assigned or encumbered said permit.

TO HAVE AND TO HOLD the same, to the ETSI PIPELINE PROJECT, and the ETSI PIPELINE PROJECT does hereby assume all obligations imposed under or in connection therewith.

IN WITNESS WHEREOF, the SOUTH DAKOTA CONSERVANCY DISTRICT has caused this assignment to be executed this 9 day of Feb., 1982.

SOUTH DAKOTA
CONSERVANCY DISTRICT

By /s/ Robert L. Helmer
Robert L. Helmer, Chairman
Board of South Dakota
Conservancy District

Acceptance:

ETSI Pipeline Project

By Wesley Witten

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

On this 9th day of February, 1982, before me, the undersigned officer, personally appeared, ROBERT L. HELMER, who acknowledged himself to be the Chairman, of the Board of SOUTH DAKOTA CONSERVANCY DISTRICT, and that he, as such Chairman, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the SOUTH DAKOTA CONSERVANCY DISTRICT by himself as Chairman.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ [Illegible]
Notary Public, South Dakota

My Commission Expires: 9-20-87
[SEAL]

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

On this the 11th day of February, 1982, before me, the undersigned officer, personally appeared, Wesley Witten, who acknowledged himself to be the President of ETSI PIPELINE PROJECT, and that he, as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of ETSI PIPELINE PROJECT by himself as President.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ Mary Helen Bisson
Notary Public, South Dakota

My Commission Expires: 1-19-84
[SEAL]

NOTICE OF TRANSFER OF WATER PERMIT

TO: Water Rights Division
Foss Building
Pierre, SD 57501

Date: February 11, 1982

This is to notify you that the title to the lands described as follows: Permit No. 1791-2 for 50,000 acre feet of water annually from the Missouri River-Oahe Reservoir Storage—for Energy Industry Use, formerly owned by the South Dakota Conservancy District has been transferred to ETSI Pipeline Project, P.O. Box 7598, San Francisco, California 94120 together with any rights to the beneficial use of water thereon as evidenced by Water Permit No. 1791-2 as provided for in SDCL 46-5-32.

You are therefore hereby requested to file this "Notice of Transfer of Water Permit" in its appropriate file at the Division of Water Rights, Water Management Board as evidence of the change of ownership.

A fee of Two Dollars and Fifty Cents ($2.50) is hereto attached to cover filing fees as required under SDCL 46-2-13.

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Wesley Witten being first duly sworn on my oath despose and say: That my relation to the above described undertaking is that of Owner, that I have read the above foregoing statement, and I know of my own personal knowledge that the information herein stated is true.

/s/ Wesley Witten
(Signed)

Subscribed and sworn to before me this 11th Day of February, 1982

/s/ Mary Helen Bisson
(Notary Public)
My Commission Expires 1-19-84

WNR-820-7/79
Notice of Transfer of Water Permit

CONSENT TO ACTION OF MANAGEMENT COMMITTEE ETSI PIPELINE PROJECT, A JOINT VENTURE

The undersigned, representing a majority of the partnership interests of ETSI Pipeline Project, A Joint Venture, hereby consent in writing to the following action, effective June 23, 1982.

RESOLVED, that Wesley M. Witten, as President of ETSI Pipeline Project, A Joint Venture, be and hereby is authorized and empowered to enter into an Industrial Water Service Contract for use of the mainstream reservoirs of the Missouri River, including Lake Oahe, with the Upper Missouri Region Bureau of Reclamation, in the name and behalf of this Joint Venture and upon such terms and conditions as may be agreed upon between him and said Bureau of Reclamation.

Date: June 23, 1982

ARCOAL TRANSPORTATION, INC.

/s/ H. E. Bond
By: H. E. BOND

BECHTEL PETROLEUM, INC.

/s/ R. J. Mayman
By: R. J. MAYMAN

TEXAS EASTERN SLURRY
TRANSPORT COMPANY

By: W. H. MCCOLLOUGH

LEHMAN REALTY CORPORATION

By: W. A. SHUTZER

SLURCO CORPORATION

By: J. W. WILSON

ADMINISTRATIVE RECORD 900428

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION
Upper Missouri Region
P.O. Box 2553
Billings, Montana 59103

IN REPLY
REFER TO: UM-440 Jul. 2, 1982

Mr. Wesley M. Witten, President
ETSI Pipeline Project, A Joint Venture
P.O. Box 7598
San Francisco, CA 94120

Dear Mr. Witten:

On June 29, 1982, Secretary of the Interior James G. Watt approved the form of the contract to provide 20,000 acre-feet of annual water service from Lake Oahe for use in your proposed coal slurry pipeline project.

During the final processing and approval phase in our Commissioner's office, the following minor changes were made in the form of contract.

1. In the preamble, the Act of August 4, 1939 (53 Stat. 1187), was also included as cited authority.

2. In preliminary recital c, in the first sentence "approving its" was changed to "covering an" and "of 20,000" was changed to "for up to 50,000".

3. In preliminary recital e, the last sentence was added.

4. In Article 1, the subscript "a" was omitted since this is only a one-paragraph article.

5. In Article 7b, the first sentence was modified by excluding "begun construction of" and inserting "shown evidence that substantial construction is underway for".

6. In standard provision G2, the number 5 was added to the blank space to clarify that it is Article 5 that is being referenced.

We assume these changes are acceptable to you. For the record, please acknowledge your acceptance by signing in the space provided and returning the duplicate original to this office.

Sincerely yours,

/s/ Joseph B. Marcotte, Jr.
JOSEPH B. MARCOTTE, JR.
Regional Director

In duplicate

Contract changes acceptable

By /s/ Wesley Witten

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEBRASKA

MOOTNESS EXHIBIT 10

ETSI

ETSI Pipeline Project, A Joint Venture
P.O. Box 2521
Houston, Texas 77252
(713) 759-3131

July 31, 1984

South Dakota Conservancy District
Secretary of the Department of
Water and Natural Resources
Joe Foss Building
Pierre, South Dakota 57501

Re: Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Pipeline Project ("Agreement"), dated December 23, 1981, among Energy Transportation Systems Inc., ETSI Pipeline Project, the South Dakota Conservancy District and the State of South Dakota, as amended

Gentlemen:

ETSI Pipeline Project, a Joint Venture created as a partnership under the laws of Delaware and now consisting of Northern Coal Pipeline Company, Overseas Bechtel Incorporated, Slurco Corporation and Texas Eastern Slurry Transport Company, hereby cancels the Agreement, pursuant to Article 3.A.2.c(i) thereof, by giving this notice to the South Dakota Conservancy District,

since ETSI may cancel by giving notice under that provision no later than August 8, 1984.

Very truly yours,

ETSI PIPELINE PROJECT

By Northern Coal
Pipeline Company

By /s/ W. A. Henry

By Overseas Bechtel
Corporation

By /s/ John M. Huneke

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

March 2, 1987

Re: 86-939)—Energy Transportation Systems, Inc. v.
) State of Missouri, et al.
86-941)—Donald P. Hodel, Secretary of the Interior,
) et al. v. State of Missouri, et al.

• • • •

"The motion of petitioner in No. 86-939 to substitute ETSI Pipeline Project as petitioner in place of Energy Transportation Systems, Inc. is granted. The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument."

• • • •

Note: From hereinafter, the caption of the case in No. 86-939, shall be known as: *ETSI Pipeline Project v. State of Missouri, et al.*

Supreme Court, U.S.
FILED
MAY 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-939, 86-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ETSI PIPELINE PROJECT,
Petitioner,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF PETITIONER ETSI PIPELINE PROJECT

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
BARBARA L. SLOAN
HOGAN & HARTSON
(a partnership including professional corporations)
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6544
Counsel for Petitioner ETSI Pipeline Project

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior is authorized under the Flood Control Act of 1944 to contract for the beneficial use of excess irrigation water stored in the main stem reservoirs of the Missouri River Basin.

2. Whether the Court of Appeals improperly substituted its own view for that of the Secretary of the Interior concerning the appropriate construction of the Flood Control Act of 1944.

LIST OF PARTIES

The following parties were plaintiffs in the District Court and appellees in the Eighth Circuit on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944: the States of Missouri, Iowa and Nebraska, Kansas City Southern Railway Company, the Sierra Club and the Nebraska, Iowa and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America.

The following parties were defendants in the District Court and appellants in the Eighth Circuit * on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944: Energy Transportation Systems Inc. [now ETSI Pipeline Project, per order of this Court dated March 2, 1987; in this brief, all references will be to ETSI Pipeline Project]; Colonel William R. Andrews, Jr. [Steven G. West], District Engineer, Omaha District, United States Army Corps of Engineers; Brigadier General Mark J. Sisinyak [Charles E. Dominy], Division Engineer, Missouri River Division, United States Army Corps of Engineers, Omaha, Nebraska; Lieutenant General J.K. Bratton [E.R. Kieberg, III], Chief of Engineers, United States Army Corps of Engineers; John O. Marsh, Jr., Secretary of the Army; Joseph B. Marcotte, Jr., Regional Director, Upper Missouri Region, Bureau of Reclamation; Robert N. Broadbent [C. Dale Duvall], Commissioner, Bureau of Reclamation; Maxwell T.L. Lieurance, Wyoming State Director, Bureau of Land Management; Robert F. Burford, Director, Bureau of Land Management; Garrey E. Caruthers [Wayne N. Merchant], Assistant Secretary of the Department of the Interior for Land and Water Resources [Assistant Secretary of the Department of the

---

* Where the named parties have changed, the new names are included in brackets. Similarly, where the title of a position has changed, the new title is in brackets.

Interior for Water and Science]; James G. Watt [Donald P. Hodel], Secretary of the United States Department of the Interior; Craig W. Rupp, Regional Forester, Region II, (Rocky Mountain Region), United States Forest Service; R. Max Peterson, Chief, United States Forest Service; John R. Block [Richard E. Lyng], Secretary of the United States Department of Agriculture; Anne M. Gorsuch [Lee M. Thomas], Administrator, Environmental Protection Agency.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
A. ETSI's Contract	4
B. The District Court's Decision	5
C. The Eighth Circuit's Decision	6
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. The Flood Control Act and the Reclamation Act Authorize the Secretary of the Interior to Market Excess Irrigation Water at Missouri River Main Stem Reservoirs	9
A. Section 9 of the Flood Control Act Adopted the Pick-Sloan Plan and Thereby Gave the Secretary Authority over All Reservoir Irrigation Features, Including Stored Irrigation Water at Lake Oahe	9
1. The Pick Report	11
2. The Sloan Report	12
3. The Pick-Sloan Plan	14

TABLE OF CONTENTS—Continued

Page

B. The Legislative History Fully Supports the Secretary's Interpretation of Section 9 of the Flood Control Act 16

C. A Consistent History of Agency Interpretation, Concurred in by the Corps and Accepted by Congress, Supports the Secretary's View of the Scope of His Authority over Irrigation Storage in the Main Stem Reservoirs.... 20

1. The Secretary's Interpretations Prior to 1974 20

2. The Secretary's 1974 Interpretation..... 22

3. The 1975 Memorandum of Understanding 24

4. Congress' 1982 Confirmation of the Secretary's Interpretation 26

D. The Eighth Circuit's Decision Contradicts Every Significant Indication of Congress' Intent 28

II. The Secretary's Construction of His Section 9 Authority Was Reasonable and Therefore Entitled to Deference 32

III. The Remaining Provisions of the Flood Control Act Support the Secretary's Interpretation of the Scope of His Authority Under Section 9..... 37

A. Section 8 of the Flood Control Act Confirms that Congress Intended the Reclamation Laws to Govern Irrigation Storage at Corps Reservoirs 38

B. The Legislative History of Section 6 of the Flood Control Act Is Not Contrary to the Secretary's Interpretation 42

TABLE OF CONTENTS—Continued

Page

C. Section 7's Limited Grant of Authority to the Corps over Storage for Navigation and Flood Control Supports the Secretary's Conclusion that He Has Authority over Irrigation Storage 44

CONCLUSION 46

APPENDICES

APPENDIX A

H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944) (excerpts only) 1a

APPENDIX B

S. Doc. No. 191, 78th Cong., 2d Sess. (1944) (excerpts only) 50a

APPENDIX C

S. Doc. No. 247, 78th Cong., 2d Sess. (1944) .. 93a

APPENDIX D

Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., Part 1 (1975) (excerpts only) 104a

TABLE OF AUTHORITIES

CASES: Page

Chemical Mfrs. Ass'n v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985) 37
Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 32, 33, 34, 35, 36
Clark v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947) 44
Commodity Futures Trading Comm'n v. *Schor*, 106 S. Ct. 3245 (1986) 36, 37
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 9
Environmental Defense Fund, Inc. v. *Morton*, 420 F. Supp. 1037 (D. Mont. 1976), *aff'd in pertinent part sub nom. Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979) 21, 22
Federal Deposit Ins. Corp. v. *Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986) 37
Fourco Glass Co. v. *Transmirra Products Corp.*, 353 U.S. 222 (1957) 44
Ginsberg & Sons, Inc. v. *Popkin*, 285 U.S. 204 (1932) 44
Lukhard v. *Reed*, 55 U.S.L.W. 4561 (U.S. Apr. 22, 1987) 34
Tanksley v. *United States*, 321 F.2d 647 (8th Cir. 1963) 44
United States v. *City of Fulton*, 106 S. Ct. 1422 (1986) 33, 35, 37
United States v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985) 33, 36
United States v. *Turkette*, 452 U.S. 576 (1981) 9
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973) 44

STATUTES AND REGULATIONS:

28 U.S.C. § 1254(1) (1982) 2
Flood Control Act of 1944
Section 6, 33 U.S.C. § 708 (1982) 30, 39, 42, 43, 44
Section 7, 33 U.S.C. § 709 (1982) 44, 45

TABLE OF AUTHORITIES—Continued

Page

Section 8, 43 U.S.C. § 390 (1982) ..38, 39, 40, 41, 42, 44
Section 9, Pub. L. No. 78-534, 58 Stat. 887 ..... *passim*

Reclamation Project Act of 1939

Section 9, 43 U.S.C. § 485h (1982) ..... *passim*

Reclamation Reform Act of 1982

Section 212, 43 U.S.C. § 390*ll* (1982) 3, 26, 27

Pub. L. No. 90-453, 82 Stat. 624 (1968) 31
Pub. L. No. 88-442, 78 Stat. 446 (1964) 31
WEB Rural Water Development Project Act of 1982, Pub. L. No. 97-273, §§ 3a and 4, 96 Stat. 1181, 1182 31
Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, § 7-3(c) (Jan. 29, 1982) 30

CONGRESSIONAL MATERIALS:

Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944) ..... *passim*
Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works, 85th Cong., 1st Sess., Part 2 (1957) 21
Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., Part 1 (1975) 4, 23, 25
S. Rep. No. 1030, 78th Cong., 2d Sess. (1944) 41
H.R. Conf. Rep. No. 2070, 78th Cong., 2d Sess. (1944) 43
H.R. Rep. No. 1309, 78th Cong., 2d Sess. (1944) 40
S. Doc. No. 247, 78th Cong., 2d Sess. (1944) ..4, 10, 14, 15, 31, 39
S. Doc. No. 191, 78th Cong., 2d Sess. (1944) 10, 12, 13, 14, 15, 19, 31
H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944) ..10, 11, 12

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 373, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 2570	26
90 Cong. Rec. 4125 (1944)	19, 44
90 Cong. Rec. 4126 (1944)	17
90 Cong. Rec. 4127 (1944)	17
90 Cong. Rec. 4130 (1944)	17
90 Cong. Rec. 4133 (1944)	30, 44
90 Cong. Rec. 4134 (1944)	42
90 Cong. Rec. 8375 (1944)	38
90 Cong. Rec. 8489 (1944)	17
90 Cong. Rec. 8623 (1944)	17
90 Cong. Rec. 8674 (1944)	43
90 Cong. Rec. 8675 (1944)	38, 39, 43
90 Cong. Rec. 9264 (1944)	18, 41
128 Cong. Rec. 16607 (1982)	27
128 Cong. Rec. 16609 (1982)	27
128 Cong. Rec. 16610 (1982)	32
128 Cong. Rec. 16611 (1982)	27

OTHER MATERIALS:

41 Op. Att'y Gen. 377 (1958)	22
2A N. Singer, *Sutherland: Statutes & Statutory Construction* § 46.05 (Sands 4th ed. 1984)	44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-939, 86-941

ETSI PIPELINE PROJECT,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF PETITIONER ETSI PIPELINE PROJECT

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 787 F.2d 270 and appear as Appendix A to the Petition for a Writ of Certiorari ("Pet. App. A").[1] The opinion of the United States Dis-

---

[1] The following abbreviations are used in this brief: "Pet. App." refers to the Appendix to ETSI Pipeline Project's Petition for a Writ of Certiorari; "J.A." refers to the Joint Appendix filed in conjunction with the briefs on the merits; "App." refers to the Appendix to this brief; and "A.R." refers to the Administrative Record filed with the district court.

trict Court for the District of Nebraska is reported at 586 F. Supp. 1268 and appears as Pet. App. B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 13, 1986. Pet. App. C. The petition for rehearing and suggestion of rehearing en banc were denied by order dated July 10, 1986. Pet. App. D. The petition of ETSI Pipeline Project ("ETSI")[2] for a writ of certiorari was filed on December 8, 1986 in accordance with an extension of time for filing granted by Justice Blackmun. The petition was granted on March 2, 1987.[3]

STATUTES INVOLVED

Section 9 of the Flood Control Act of 1944,[4] Pub. L. No. 78-534, ch. 665, 58 Stat. 887, provides in part:

> (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

---

[2] The petition was filed in the name of Energy Transportation Systems Inc. By letter dated January 27, 1987, ETSI Pipeline Project, the real party in interest in this litigation, requested that it be substituted for the corporation. That request was granted on March 2, 1987.

[3] In its March 2, 1987 order, the Court likewise granted the petition for a writ of certiorari filed by Secretary of the Interior Donald P. Hodel and the other federal parties, and it consolidated the cases.

[4] All other pertinent provisions of the Flood Control Act of 1944 are reprinted in Pet. App. E.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation laws (Act of June 17, 1902, 32 Stat. 388 [43 U.S.C. §§ 372 et seq.] and Acts amendatory thereof or supplementary thereto) . . . .

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1982), provides in part:

> The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: Provided, That . . . [n]o contract relating to municipal water supply or miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

Section 212(b) of the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll*(b) (1982), provides:

> Notwithstanding any other provisions of this section to the contrary, obligations that require water users, pursuant to contracts with the Secretary, to repay the share of construction costs and to pay the share of the operation and maintenance and contract administrative costs of a Corps of Engineers project which are allocated to conservation storage or irrigation storage shall remain in effect.

STATEMENT OF THE CASE

A. ETSI's Contract

In 1981, ETSI obtained a water use permit from the State of South Dakota [5] allowing it to appropriate specific amounts of water from Lake Oahe, a federal reservoir located entirely within that state.[6] J.A. 152. ETSI planned to transport the water by aqueduct to the Powder River Basin in Wyoming to be mixed with coal and then to move the slurry mixture through an approximately 1,000-mile long coal slurry pipeline to coal-fired power plants in the southeastern United States. South Dakota conditioned its permit on ETSI's agreement to make certain periodic payments to the State and to deliver water to several South Dakota communities along the aqueduct that lack adequate water supplies of their own. *Id.*

With its state permit in hand, ETSI applied to the Secretary of the Interior ("the Secretary") for a water service contract permitting it to withdraw 20,000 acre feet of water per year from Lake Oahe. After consultation with the United States Army Corps of Engineers

---

[5] As part of its industrial water marketing program, the Bureau of Reclamation requires an applicant for a federal water service contract to first obtain any necessary state water permits. *Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., Part 1, at 4 (1975) ("1975 Senate Hearings") (App. 110a-112a). For the convenience of the Court, excerpts from the 1975 Senate Hearings are set out in the Appendix to this brief.

[6] Lake Oahe is one of the six federal reservoirs built along the main stem of the Missouri River. It has a capacity of approximately 23,500,000 acre feet and was built to provide storage for irrigation, flood control, navigation, hydroelectric power and other purposes. S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944) (App. 98a).

("the Corps"), which built and operates Lake Oahe, and after finding that the contract would not impair the irrigation function of the reservoir, the Secretary approved a forty-year contract with ETSI pursuant to Section 9 of the Flood Control Act of 1944 ("the Act") and Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1982) ("the Reclamation Act"). Thereafter, the Corps issued a permit allowing ETSI to construct a water intake structure to remove the water from Oahe.

B. The District Court's Decision

The States of Iowa, Missouri and Nebraska, the Kansas City Southern Railway, several farmers groups and the Sierra Club filed suit in the United States District Court for the District of Nebraska against ETSI, the Secretary, the Corps and a number of other federal agencies and officials, challenging the federal permits and approvals. One of the plaintiffs' many allegations was that the Secretary did not have authority under the Act to enter into the contract with ETSI.

The parties filed cross-motions for summary judgment on the question of the Secretary's authority. The district court determined that the Secretary lacked the necessary authority and enjoined the contract. While acknowledging that Section 9(c) of the Act gives the Secretary water marketing authority over "reclamation developments," the court posited three reasons for determining that the Secretary has no such authority over water stored for irrigation at the Missouri River main stem reservoirs. First, Lake Oahe was built and is operated by the Corps. Second, although Oahe contains substantial storage intended for irrigation, its dominant purpose is flood control, and it has not been used for irrigation. And third, even though Section 9(a) of the Act gives the Corps and Interior shared jurisdiction over each multiple-purpose reser-

voir according to their respective areas of expertise, Congress intended Interior's jurisdiction to extend only to irrigation distribution systems, not to the water stored for irrigation. In essence, therefore, the district court concluded that, unless the Secretary actually built irrigation *works*, he had no jurisdiction over irrigation *storage* at dams built and operated by the Corps. Pet. App. 54a-59a.

C. The Eighth Circuit's Decision

The Eighth Circuit affirmed by a divided vote, largely for the reasons offered by the district court. The majority asserted that the *only* relevant inquiry "is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to Section 9(c) of the Act." *Id.* 19a. Having thus framed the issue, the majority inevitably found that Lake Oahe as a whole was *not* a "reclamation development" because it was "undertaken and controlled by the agency with the dominant interest"—the Corps. *Id.* 21a. That being so, the majority concluded, the Secretary could not have jurisdiction over the irrigation water stored in Oahe because Oahe was not a "reclamation development."

In reaching this conclusion, the Eighth Circuit majority gave no weight to the Secretary's long-standing interpretation of the Act or to the subsequent congressional action affirming the Secretary's interpretation. Indeed, the court refused to give *any* deference to the Secretary's interpretation of the scope of his authority, reasoning that "[t]he limits of an administrative agency's statutory authority remains an issue suitable for judicial resolution." *Id.* 33a.

In dissent, Judge Bright concluded that the majority's approach and opinion turned the rule of deference on its head. Because the Secretary had consistently interpreted the term "reclamation development" in Section 9 of the Act to include irrigation water stored in Corps-operated

reservoirs, Judge Bright recognized that the question for the court was whether that was a reasonable interpretation. *Id.* 38a. Finding the Secretary's interpretation entirely reasonable and in accord with the concept of shared jurisdiction approved by Congress in Section 9 of the Flood Control Act, Judge Bright would have upheld the Secretary. *Id.* 36a. Judge Bright further noted that, because of the statutory limitations on the water marketing authority of the Secretary of the Army,[7] the majority's decision effectively left the irrigation storage of the main stem dams "without a governing agency or law." *Id.* 43a. Even worse, the decision renders "the irrigation water stored in the vast Oahe reservoir . . . unused and useless." *Id.* Judge Bright concluded that Congress "[s]urely . . . did not intend such incongruous consequences." *Id.*

On petition for rehearing en banc, the ten voting members of the Eighth Circuit were evenly divided. Accordingly, the majority opinion of the panel was left standing.

SUMMARY OF ARGUMENT

Section 9(a) of the Flood Control Act adopted a comprehensive plan for the development of Missouri Basin water resources. The plan assigned the Secretary of the Interior jurisdiction over and responsibility for reclamation features of the plan—including irrigation storage at the main stem reservoirs built and operated by the Corps. In carrying out his responsibilities under this comprehensive development plan, the Secretary is required by Section 9(c) of the Act to administer all "reclamation developments" in accordance with general reclamation law. Construing Sections 9(a) and 9(c) together, the Secre-

---

[7] The Flood Control Act conferred jurisdiction on the "Secretary of War." Subsequently, however, the duties under the Act were assumed by the Secretary of the Army. All references herein will be to the Secretary of the Army.

tary properly contracted with ETSI for the use of excess irrigation storage at Lake Oahe.

The Secretary's action is supported not only by the terms of Section 9 and the development plan expressly incorporated therein, but also by the legislative history of the Act, the long-standing interpretation of the agency, and a recent reaffirmation by Congress of the scope of the Secretary's authority. Moreover, the Secretary's interpretation directly advances the three fundamental objectives of the development plan: maximum beneficial use of Basin water; functional division of authority between the two agencies charged with the plan's development; and flexibility to respond to changing conditions in the Basin.

The Secretary's interpretation of Section 9 was a reasonable resolution of a question Congress never squarely addressed—the proper disposition of irrigation storage in the absence of any irrigation demand at the main stem reservoirs. Thus, the Eighth Circuit was required to defer to the Secretary's resolution of this question.

In rejecting the Secretary's construction of Section 9, the Eighth Circuit erroneously fixed on Section 9(c)'s reference to "reclamation developments"—a term nowhere defined in the Act—and based solely on this term reasoned that the Secretary has authority over reclamation features only when he builds "irrigation works." This conclusion is directly contradicted by the plan adopted in Section 9(a), and it renders the vast excess irrigation storage of the main stem reservoirs beyond reach for any beneficial consumptive use. Such a result is completely at odds with the terms, policies and history of the Act and should not be accepted by this Court.

ARGUMENT

I. The Flood Control Act and the Reclamation Act Authorize the Secretary of the Interior to Market Excess Irrigation Water at Missouri River Main Stem Reservoirs.

The Secretary of the Interior premised his contractual authority in this case on Section 9 of the Flood Control Act. A careful reading of that Section, together with the House and Senate documents that were expressly approved in Section 9(a), makes clear that Congress intended the Secretary to have the authority to ensure the maximum beneficial use of the water stored for irrigation in Basin reservoirs. This interpretation is corroborated by the history of the Act and is fully consistent with the policies of the Act. It is further in accord with the Secretary's long-standing, consistent interpretation of the Act and a recent reaffirmation of that interpretation by Congress. The Eighth Circuit's refusal to consider all these indications of congressional intent—and its insistence on reading the words "reclamation developments" from Section 9(c) in a vacuum—caused it to misconstrue the Secretary's authority.

A. Section 9 of the Flood Control Act Adopted the Pick-Sloan Plan and Thereby Gave the Secretary Authority over All Reservoir Irrigation Features, Including Stored Irrigation Water at Lake Oahe.

Analysis of the scope of the Secretary's authority of course begins with the language of the law giving him that authority.[8] Here, that law is Section 9 of the Flood Control Act, an Act that authorized a nationwide program for the development of the country's water resources. Section 9 is addressed specifically and exclusively to Missouri River Basin development.

---

[8] *See United States* v. *Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Section 9(a) expressly adopted and approved the "general comprehensive plans" for the development of the Basin that were set forth in three documents: (1) the Pick Report, prepared by Colonel Pick of the Corps and published as H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944); (2) the Sloan Report, prepared by Assistant Regional Director Sloan of Interior's Bureau of Reclamation and published as S. Doc. No. 191, 78th Cong., 2d Sess. (1944); and (3) the jointly-prepared reconciling report, S. Doc. No. 247, *supra*. These three documents together have become known as the Pick-Sloan Plan.[9]

The remaining provisions of Section 9 were designed to ensure implementation of the Pick-Sloan Plan adopted in Section 9(a). Section 9(b) directed the Secretary of the Army to carry out those parts of the Plan that were assigned to him. And Section 9(c) specified that, "[s]ubject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users" set forth in the Pick-Sloan documents, the Secretary of the Interior was to undertake the various "reclamation developments" assigned to him "under said plans" in accordance with the general reclamation laws.[10] The latter laws govern Interior's administration of irrigation and other beneficial consumptive uses of water at all Bureau of Reclamation projects.

Through its adoption of the terms of the Pick-Sloan Plan in Section 9(a), Congress defined the Secretary's authority in the Missouri Basin development. Through Section 9(c), Congress identified the laws that govern the Secretary's exercise of that authority. Because the issue before the Court is the scope of the Secretary's authority, ETSI begins its analysis with the "general com-

---

[9] For the convenience of the Court, pertinent portions of these three House and Senate documents are set out in the Appendix to this brief.

[10] Sections 9(d) and 9(e) authorized appropriations for the implementation of the initial stages of the Pick-Sloan Plan.

prehensive plans" expressly adopted in Section 9(a). Those plans define the Secretary's authority as surely as if their words were found in Section 9 itself.[11]

1. *The Pick Report*

Prepared by the Corps at the request of Congress after a series of devastating floods in the Basin, the Pick Report focused primarily on improving flood control. Nevertheless, the report also acknowledged the desirability of multiple-purpose reservoirs, which would provide "for the most efficient utilization of the waters of the Missouri River Basin for all purposes," and thereby tend to stabilize "the economic life of the valley and . . . interstate commerce" as well as encourage "industrial and civic developments." H.R. Doc. No. 475, at 29 (App. 46a).

Contrary to the lower courts' rulings, the Pick Report in no way suggested that the Corps would have exclusive control over the reservoirs it built, nor that the Secretary of the Interior's jurisdiction at the main stem reservoirs would be limited to irrigation uses of water. Instead, recognizing "the broad and important interests and responsibilities of the Bureau of Reclamation in the Missouri River Basin," the Corps noted in the Pick Report

---

[11] When it was considering the bill, Congress recognized that the provisions of the Plan would be the law that governed Missouri Basin development. During the Senate hearings, Colonel Reber of the Corps, addressing one of the specific recommendations of the Pick Plan, noted that, if the bill were passed, that recommendation "will become a part of the basic law." *See Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. 667 (1944) ("1944 Senate Hearings"). In a similar vein, Senator Overton, one of the principal sponsors of the bill, noted that "the Pick plan is already in the House bill." *Id.* at 506. Likewise, Senator Robertson asked Senator Overton whether he also intended to have "the Sloan plan incorporated in this bill." *Id.* at 515-16. Ultimately, of course, the Sloan Report, like the Pick Report, was incorporated in the bill, and it too thereby became part of the "basic law" governing Missouri Basin development.

that it would "continue to plan its work in that basin so as to coordinate fully the activities of both agencies." *Id.* at 3 (App. 7a). Consistent with this objective, in transmitting the report to Congress, Major General Reybold, Chief of Engineers for the Corps, proposed a system of *shared* jurisdiction to govern Basin reservoirs. He stated that, while the Corps should retain responsibility for all matters related to flood control and navigation, the Bureau of Reclamation should have full responsibility for the utilization of storage provided for irrigation—*regardless of which agency was operating a particular reservoir*:

> Tributary reservoirs should, when advisable from the standpoint of basin-wide development, be constructed, operated, and maintained by the agency with the dominant interest under existing law. It is essential, however, that the mainstem projects be built, operated, and maintained by the Corps of Engineers, and that utilization of storage reserved for flood control in all multiple-purpose reservoirs on tributaries be in accordance with regulations prescribed by the Secretary of [the Army]. . . . Conversely, *utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior.*

Id. at 3-4 (emphasis added) (App. 7a-8a).

2. *The Sloan Report*

The Sloan Report, prepared by the Bureau of Reclamation, was the product of a five-year study of the physical features and the existing and expected economic development of the entire Basin. In the report, the Bureau stressed the broad range of purposes its study was intended to serve:

> It is a *comprehensive plan for the highest beneficial use of the waters of the basin.* It provides for flood control, navigation, irrigation, power development, *domestic and industrial water supplies*, silt control,

> recreational use of waters, conservation of fish and wildlife, and pollution abatement, and will assist in the restoration and maintenance of groundwater levels and inland lakes.

S. Doc. No. 191, at 10 (emphasis added) (App. 67a). Recognizing the need for flexibility in such an undertaking, the Sloan Report proposed a plan "adapted to development in stages, and to such modifications as changes in physical and economic conditions make necessary." *Id.* at 17 (App. 79a).

Significantly, the Sloan Report like the Pick Report, expressly provided that the Corps and the Bureau should play coordinate roles in developing Missouri River Basin projects, with authority allocated *by function*:

> *The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature,* giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where the flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. *All irrigation features should be operated by the Bureau of Reclamation or its agents.* All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. *Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.*

S. Doc. No. 191, at 11 (emphasis added) (App. 68a).

In the Corps' formal comments on the Sloan Report, Major General Reybold reemphasized his agreement with this view: "In *all reservoirs*, utilization of storage for flood control should be in accordance with regulations

prescribed by the Secretary of [the Army] and *utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior.*" *Id.* at 8 (emphasis added) (App. 63a).

3. *The Pick-Sloan Plan*

Although the Pick and Sloan Reports thus espoused the same broad concepts, they differed as to the details of various Basin projects. Accordingly, the Senate asked representatives from the Corps and the Bureau to undertake a further report reconciling those differences and recommending a unified approach to the development of the Missouri River Basin. 1944 Senate Hearings at 516-25. Senate Document No. 247, the third document adopted and approved for implementation in Section 9(a) of the Flood Control Act, reflects the results of the joint committee's work.

The joint report began by emphasizing that, in reconciling those differences that had existed between the Pick and Sloan Reports, the committee had been guided by the "basic principle" of allocating responsibility between the Bureau and the Corps at each reservoir based on the functions to be carried out at the reservoir.[12] The committee further recognized that it had been charged with developing a plan "to more fully utilize the water re-

---

[12] Senate Document No. 247 states:

> It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:
>
> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary raservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

Id. at 1 (App. 94a).

sources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses." *Id.* at 3 (App. 97a).

Employing these basic principles, the committee agreed on a single plan for the Basin. For Lake Oahe, the Pick Report had originally proposed a capacity of 6,000,000 acre feet in order to meet flood control needs. S. Doc. No. 247, at 2 (App. 96a). The Sloan Report, however, had placed greater emphasis on the multiple-purpose possibilities of Oahe and, in particular, on its irrigation potential. Thus, it had recommended that Oahe be built with a capacity of 19,600,000 acre feet to allow the reservoir to be used for a major irrigation project in South Dakota's James River Basin. S. Doc. No. 191, at 115-16 (App. 91a-92a). The final plan accepted the Bureau of Reclamation's recommendations for Lake Oahe, stressing the broad range of functions the expanded version of the reservoir could serve:

> The selection of the high Oahe Dam, Reservoir, and power plant as proposed in Senate Document 191 . . . is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes.

S. Doc. No. 247, at 3 (App. 98a).

The foregoing demonstrates that, although the Pick-Sloan documents adopted by Congress differed as to certain details, they were in complete harmony as to three fundamental policies. First, Basin development should promote the maximum beneficial use of water in the region. Second, there should be coordinate and cooperative jurisdiction at Basin reservoirs, *i.e.*, jurisdiction was *not* to be allocated on the basis of which agency built a particular reservoir, but rather each agency was assigned responsibility at *each* multiple-purpose reser-

voir according to the functions within that agency's areas of expertise. Finally, the development plan was designed to be flexible and to be implemented in light of changing circumstances by the two jointly responsible agencies.

The Secretary advanced all three of these policies when he contracted with ETSI for an industrial use of excess irrigation storage. Although Pick-Sloan anticipated that Oahe would serve a substantial irrigation purpose, because that demand has not developed, the Secretary exercised his ancillary authority under the reclamation laws to make irrigation storage available for other beneficial consumptive uses. In so doing, he promoted the maximum beneficial use of the water, exercised his authority over the reservoir's irrigation features, and adapted Basin development plans to the unexpected lack of irrigation demand. Furthermore, he carried out Congress' intent that the government be reimbursed for the reclamation storage provided in the Basin. Finally, and perhaps most significantly, he fulfilled his responsibility under Section 9(a) to administer the irrigation features of a multiple-purpose reservoir in accordance with the reclamation laws made applicable by Section 9(c). The Secretary's authority to enter the ETSI contract is therefore clearly established by the terms of Section 9.

B. The Legislative History Fully Supports the Secretary's Interpretation of Section 9 of the Flood Control Act.

The legislative history of Section 9 confirms that Congress intended the Secretary to administer the irrigation storage at Lake Oahe in accordance with the reclamation laws and, more particularly, that he had the authority to contract with ETSI for an industrial use of excess irrigation storage.

During the debates on the bill, Representative Whittington, Chairman of the House Committee on Flood

Control, for example, emphasized that "public policy requires not only that flood-control storage be under the supervision of the Secretary of [the Army] and the Chief of Engineers but also *that storage for the reclamation of arid lands be under the supervision of the Secretary of the Interior.*" 90 Cong. Rec. 4127 (1944) (emphasis added). He in no way suggested that the Secretary of the Interior's authority was limited to instances in which water was being used in irrigation "works." Rather, he noted that the bill gave the Secretary the power to administer *both* "reclamation *and* the disposal of reclamation waters provided by the projects authorized in this bill." *Id.* at 4126 (emphasis added). Representative Curtis from Nebraska, another major sponsor of the legislation, likewise noted that the Act "gives the Bureau of Reclamation jurisdiction over the irrigation features of the reservoirs and the distribution systems." *Id.* at 4130.

President Roosevelt himself supported the policy of shared jurisdiction over Missouri Basin projects. In a letter to Congress at a time when the Bureau and the Corps were debating which of them should have control over particular projects, the President urged:

> No matter which agency builds a multiple-purpose structure involving in even a minor way the interests of the other, *the agency with the responsibility for that particular interest should administer it in accordance with its authorizing legislation and general policies.* For example, the Bureau of Reclamation . . . should administer, under the reclamation laws and its general policies, those irrigation benefits and phases of projects built by the Corps of Engineers.

Id. at 8623 (emphasis added). Senator O'Mahoney subsequently explained that it was the intervention of the President that brought about agreement between the Corps and the Bureau on a plan for shared control over the Missouri River Basin. *Id.* at 8489. And just before

final passage, Senator Overton, one of the principal sponsors and managers of the bill, stressed: "No project in this bill which may include irrigation features is exempted from the reclamation laws." *Id.* at 9264.

Similar views were expressed in the Senate hearings. Secretary of the Interior Ickes stressed that "the essence" of his Department's recommendations was "to provide for the development of the Nation's water resources on a basis that will encourage the maximum utilization of all their possible benefits . . . [and] to assure that the *benefits of waters conserved for irrigation* or for power *shall be distributed as widely as possible* among the people." 1944 Senate Hearings at 463 (emphasis added). Colonel Reber of the Corps pointed out the need to apply the plan flexibly to respond to changing conditions:

> Although I certainly hesitate very much to even appear to pose as a prophet, I venture to say that all of the details of this great Missouri program will not be worked out for 10 years or 20 years or even more. Then, when we have finally worked out all those details, I am sure we may not even recognize some of those details when we compare them with what we started with today. . . . That is why we must keep the over-all plan for the Missouri flexible.

Id. at 668-69.

The legislative history of the Act also demonstrates that, in incorporating the federal reclamation laws in Section 9(c) of the Act, Congress clearly knew that those reclamation laws gave the Secretary the power to market water for non-irrigation purposes. Only a few years before, Congress had amended the reclamation laws to authorize the Secretary "to enter into contracts to furnish water for municipal water supply or miscellaneous purposes," provided the contracts "will not impair the efficiency of the project for irrigation purposes." Section 9(c), Reclamation Act, 43 U.S.C. § 485h(c). In the House debates on what ultimately became Section 6 of

the Flood Control Act, Representative Whittington expressly noted the Secretary's broad reclamation authority and argued that the Corps should be granted a similar authority with respect to water under its jurisdiction:

> Section [6] provides that if there is a town or a city or a municipality that needs an additional water supply . . . the Chief of Engineers shall have the right to provide that that water shall be used there for the purpose of supplying the needs of man. It strikes me that *that provision is a power that now obtains under the reclamation law.* If it obtains under the reclamation law, I know of no good reason why it should not obtain in the existing bill.

90 Cong. Rec. 4125 (1944) (emphasis added).

Indeed, in presenting its Sloan Report to Congress, the Bureau of Reclamation highlighted the fact that its plan was designed to serve a host of non-agricultural purposes, including industrial water supply:

> To the extent that the several functions of water control and utilization are conflicting, preference should be given to those which make the greatest contribution to the well-being of the people and to the areas of the greatest need. To the extent that the uses of water are competitive, *the use of water for domestic, agricultural, and industrial purposes should have preference. The plan would meet these objectives.*

S. Doc. No. 191, at 10 (App. 67a-68a) (emphasis added). If Congress had intended to prohibit this use of irrigation storage in the main stem reservoirs of the Missouri Basin, it would surely not have provided for the wholesale incorporation of the federal reclamation laws in Section 9(c) of the Flood Control Act. Nor would it have repeatedly indicated its understanding that the Secretary would apply the reclamation law to all irrigation features of Basin developments. Accordingly, the legislative history confirms the Secretary's contracting authority over Oahe's irrigation storage.

C. A Consistent History of Agency Interpretation, Concurred in by the Corps and Accepted by Congress, Supports the Secretary's View of the Scope of His Authority over Irrigation Storage in the Main Stem Reservoirs.

The Secretary's understanding that he has full authority to contract for non-irrigation uses of the irrigation storage at Lake Oahe is further supported by a long history of consistent agency interpretations. These interpretations have taken the form of testimony before Congress, formal legal opinions, a Memorandum of Understanding ("MOU") with the Secretary of the Army and a series of contracts similar to the ETSI contract. Moreover, the Secretary's interpretation has been repeatedly reviewed and approved by Congress.

1. *The Secretary's Interpretations Prior to 1974*

Although the precise question of the Secretary's industrial water marketing authority at Corps-operated reservoirs did not arise until 1974, the Secretary confronted several related questions prior to that time and on each occasion his interpretation of the Act was fully consistent with his interpretation in this case.

For example, at Senate oversight hearings in 1957 concerning the treatment of revenues from power production at Missouri Basin projects, Edward Weinberg, Assistant Solicitor for the Department, explained in detail Interior's view that Section 9(c) of the Flood Control Act did not simply adopt the plans for the physical structures called for by the Pick-Sloan Plan—the view the Eighth Circuit espoused in this case—but, rather, fully incorporated federal reclamation law with respect to all reclamation and power aspects of the development project. By virtue of that incorporation, Interior had concluded that all revenues from power generation at Basin projects—both Corps-operated and Bureau-operated—were to be used to

reimburse project costs attributable to irrigation.[13] It was, of course, this same understanding that led the Secretary to conclude that the Section 9(c) industrial water marketing authority he indisputably has over irrigation storage at Bureau of Reclamation-built reservoirs [14] likewise applies to such storage at Corps-built projects.

---

[13] *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works*, 85th Cong., 1st Sess., Part 2, at 313-353 (1957) (1957 Senate Hearings). In reaching this conclusion, Interior placed great weight on the terms of the Pick-Sloan documents:

> Senator Case: Well, just a minute. Section 9(c) [of the Flood Control Act] does not go to the physical structures only.
>
> Mr. Weinberg: Oh, no.
>
> Senator Case: It says: "subject to the recommendations regarding the benefits, the allocations of costs, and the repayments by water users made in such documents."
>
> Mr. Weinberg: That is correct. And that is the premise upon which the Secretary concluded that the power from these Army structures was to be marketed under reclamation law for the purpose of meeting the irrigation costs from these irrigation developments that were beyond the repayment ability of the water users. That is the significance of the basin-wide findings and recommendations.

1957 Senate Hearings at 318.

[14] *Environmental Defense Fund, Inc.* v. *Morton*, 420 F. Supp. 1037 (D. Mont. 1976), *aff'd in pertinent part sub nom. Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979), confirms that Section 9(c) of the Reclamation Act, as incorporated in Section 9(c) of the Flood Control Act, authorizes the Secretary to market excess irrigation storage in the multiple-purpose reservoirs of the Missouri Basin for industrial use. The contracts at issue there involved water stored in reservoirs built by the Bureau of Reclamation. The district court found in the Pick-Sloan Plan a congressional intent both to ensure that "all beneficial uses of water could be accommodated" and to provide "sufficient flexibility to meet unforeseen changes in the physical and economic conditions of the area." 420 F. Supp. at 1041. It thus concluded that "the sole consideration for the Secretary" was "whether industrial water use will impair the efficiency of the projects for irrigation purposes." *Id.* at 1045. Because the Secretary had found, as he did when he

In 1958, the Secretary sought confirmation from the Attorney General that the Bureau of Reclamation had full jurisdiction over waters stored for irrigation in any Corps-operated reservoir constructed pursuant to the Act. In response, the Attorney General confirmed the Secretary's jurisdiction and expressly rejected the theory that that jurisdiction was limited to circumstances where the Secretary had constructed "irrigation works." 41 Op. Att'y Gen. 377 (1958).

2. *The Secretary's 1974 Interpretation*

In 1974, the Secretary and the Corps began to explore the feasibility of employing Missouri Basin water resources to develop the Nation's energy resources. As part of that effort, the Secretary was required to confront the question of his authority to market excess irrigation storage for industrial use. In an opinion prepared at the request of the Secretary, the Interior Solicitor concluded that the Secretary has industrial marketing authority over all Missouri Basin excess irrigation storage, including storage at the Corps-built main stem reservoirs:

> It is clear that where capacity has been included in the main stem reservoirs at the request of the Bureau of Reclamation for irrigation and municipal and industrial purposes, the water available from such capacity is to be marketed for such purposes by the Bureau of Reclamation under the Reclamation laws, just as the hydroelectric power generated at those reservoirs is now being marketed by the Bureau of Reclamation under the Reclamation laws.

J.A. 124.[15]

---

approved the ETSI contract, that there would be no impairment, the court held: "the Bureau was authorized by the 1944 Act and the Reclamation Project Act of 1939 to enter into the subject contracts." *Id.* at 1043. The Ninth Circuit affirmed this holding on the basis of the district court's "comprehensive opinion." 596 F.2d at 850.

[15] The Solicitor's opinion relied on Section 9(c) of the Flood Control Act, Section 9(c) of the Reclamation Act and the terms of the Pick-Sloan Plan. J.A. 120-22.

At about the same time, the Corps likewise addressed the question of the Secretary's industrial water marketing authority. As had the Interior Solicitor, the Acting General Counsel of the Army concluded that the Secretary has that authority under Section 9(c) of the Flood Control Act and Section 9(c) of the Reclamation Act. J.A. 132-133. The Army opinion noted that Section 9(c) of the Flood Control Act "made plain that the use of the storage for 'reclamation and power' purposes falls under the aegis of the Secretary of Interior." J.A. 132. It further acknowledged that "[r]eclamation law grants the Secretary of Interior general authority to market water for municipal and industrial purposes so long as such marketing 'will not impair the efficiency of the project for irrigation purposes.'" J.A. 133.

Throughout this litigation, the respondents have attempted to use the Army opinion to their advantage, pointing to a single footnote which states that the Secretary could not carry out a water marketing program independently. J.A. 135. They ignore, however, the limited role the Army General Counsel described for the Corps: ensuring that industrial uses of water from the main stem reservoirs would not interfere with flood control operations. *Id.* The Secretary of the Army performed that function in 1975, when he joined with the Secretary of the Interior in concluding that one million acre feet of water could be made available for energy/industrial use without injuring other project purposes, including flood control. 1975 Senate Hearings at 6 (App. 116a).[16]

The Corps has thus had full input with respect to the one matter that the Army General Counsel noted was

---

[16] In addition, before issuing a permit to ETSI allowing it to withdraw from Lake Oahe the water for which it had contracted, the Corps prepared an environmental assessment addressing impacts on navigation, hydropower generation and other project uses. A.R. 930,314. That assessment identified no adverse effects on flood control.

within its purview. The remaining water contracting requirements are those imposed by Section 9(c) of the Flood Control Act and Section 9(c) of the Reclamation Act. The Corps has no role to play under those statutory provisions. Accordingly, the 1974 opinion of the Army General Counsel confirms the validity of the ETSI contract.

3. *The 1975 Memorandum of Understanding*

The opinions of the Interior Solicitor and the Army General Counsel provided the legal support for the MOU that the Secretary of the Interior and the Secretary of the Army executed in 1975. In the MOU, the two departments agreed to engage in a cooperative effort for the marketing of excess irrigation storage in the main stem reservoirs of the Missouri Basin in order to "expedite the use of water for energy development." J.A. 136. Consistent with the allocation of responsibility under the Pick-Sloan Plan, the MOU specified that the Secretary of the Interior was to "determine the amounts of water available from the capacity provided in the main stem reservoirs for irrigation," and the Secretary of the Army was to "determine how much of the water determined by the Secretary of the Interior to be excess to present irrigation needs can be made available for industrial uses" without interfering with the operation of the reservoirs for flood control. *Id.* Interior was to serve as the contracting authority, while the Army was to retain operational control over the reservoirs. *Id.*

After the two departments announced the signing of the MOU, the Senate Subcommittee on Energy Research and Water Resources, exercising its oversight responsibility, posed a series of questions to the two Secretaries concerning the authority underlying the MOU and the availability of water in the main stem reservoirs to carry out the program. In their joint response, the departments explained that they were relying on Interior's authority

to execute contracts for municipal and industrial uses of water pursuant to Section 9(c) of the Flood Control Act and Section 9(c) of the Reclamation Act. 1975 Senate Hearings at 5 (App. 114a). They further explained that, of the two million acre feet of main stem reservoir storage that reclamation studies had shown would not be needed for irrigation until at least 2023, they proposed initially to make one million acre feet available for interim industrial use. *Id.* at 6 (App. 115a-116a). They also specifically noted the pending ETSI request for water for use in its coal slurry pipeline. *Id.*

Thus, these hearings focused Congress' attention on the statutory basis for the water marketing program—precisely the same statutory grant of authority that is at issue here. Thereafter, Congress took no action to change those provisions or to otherwise restrict Interior's authority to execute water service contracts for industrial uses of irrigation storage.

The MOU had an initial term of two years, and it was extended once. J.A. 136-139. Only one water service contract was executed while the MOU was in effect.[17] After the MOU expired, however, Interior announced that it would continue the industrial water marketing program independently, following the principles established in that document and relying on the same statutory grant of authority. Two further contracts,[18] one of which is the ETSI contract, were executed after the MOU expired and before the district court ruled in this matter that the Secretary did not have the requisite authority. The other contracts were not challenged. Accordingly, the MOU and Congress' review thereof provides further support for the Secretary's authority.

---

[17] J.A. 145 (contract with Basin Electric Power Cooperative for 19,000 acre feet of water from Lake Sakakawea).

[18] J.A. 146 (contract with ANG Coal Gasification Company for 17,000 acre feet of water also from Lake Sakakawea); J.A. 224 (ETSI contract).

4. *Congress' 1982 Confirmation of the Secretary's Interpretation*

The most recent evidence that the Secretary has properly determined the scope of his authority is found in Section 212(b) of the Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261. In that legislation, Congress expressly preserved Interior's authority to enter into water service contracts in order to obtain repayment of the construction, operation and maintenance costs of Corps projects "allocated to *conservation storage* or *irrigation storage*." 43 U.S.C. § 390*ll*(b) (1982) (emphasis added).[19]

Section 212(b) of the 1982 Act was the subject of detailed discussion on the Senate floor because it was intended to address the concern of many in Congress that other provisions of the bill might undercut the government's ability to recoup costs at Corps projects that had been allocated to reclamation.[20] Both Interior and the Corps advised the Senate that Section 212(b) would fully protect Interior's ability to obtain reimbursement of the reclamation costs of such projects. Commissioner of Reclamation Broadbent explained:

> In regard to the existing and future repayment obligations for costs of Corps projects allocated to irrigation, it is our understanding and belief that [*Section 212(b)*] *would continue in effect the provisions of law requiring the repayment of costs of Corps of Engineers projects allocated to irrigation.*

---

[19] *See also* S. Rep. No. 373, 97th Cong., 2d Sess. 12, 15-16, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2570, 2576, 2579-80.

[20] Congress was particularly concerned about the effect on reclamation cost recovery of those provisions designed to free lands irrigated through privately-built irrigation works at Corps reservoirs from the acreage restrictions of the reclamation laws. *See* Section 212(a) 43 U.S.C. § 390*ll*(a) (1982); S. Rep. No. 373 at 10, 16, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2570, 2573, 2580.

128 Cong. Rec. 16607 (1982) (emphasis added). He added that Section 212(b) "assure[s] that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way." *Id.*

General Heiberg of the Corps concurred in Interior's understanding of Section 212(b), noting "enactment of the section would not result in the United States foregoing any intended repayment revenues for water storage allocated to irrigation anywhere in the United States." *Id.* at 16609. He also noted: "[i]t is general Corps policy to apply Reclamation law to those projects in the 17 western states which have irrigation as an authorized purpose." *Id.* Finally, he explained that, after such projects become operational, "the irrigation feature is normally turned over to [the Bureau of Reclamation] so it can market the water in accordance with its policies and procedures." *Id.*

General Heiberg also provided Congress with a detailed analysis of the reimbursement status of costs allocated to irrigation features at Corps-operated reservoirs, including the Missouri River main stem reservoirs. In that analysis, he emphasized that some reimbursement would come from industrial users: "A portion of the main stem storage space set aside for irrigation has been contracted for by industrial water users for interim water supplies which will bring a substantial amount of revenue to the United States." *Id.* at 16611.

General Heiberg was, of course, referring to the ETSI contract and others like it. In passing Section 212(b), Congress not only accepted the Secretary's interpretation of the scope of his authority under the Flood Control Act, but specifically reaffirmed it.

D. The Eighth Circuit's Decision Contradicts Every Significant Indication of Congress' Intent.

As the foregoing discussion demonstrates, Section 9 of the Flood Control Act, the Pick-Sloan documents incorporated therein, the legislative history of the Act, the long-standing interpretation of both Interior and the Corps and Congress' recent confirmation of that interpretation all point to the same conclusion: the Secretary has authority to administer the irrigation storage of the main stem reservoirs in the Missouri Basin in accordance with the reclamation laws.

The Eighth Circuit ignored virtually all of these indications of Congress' intent, focusing its analysis almost exclusively on Section 9(c)'s provision that "the reclamation and power developments to be undertaken by the Secretary of the Interior . . . shall be governed by the Federal Reclamation laws." Based on this single phrase, the majority asserted that "[t]he inquiry in this case then is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior . . . ." Pet. App. 19a. Relying on the undisputed fact that Lake Oahe was built and it operated by the Corps, the court concluded that it is not a "reclamation development" and that the Secretary therefore did not have authority to approve the ETSI contract. This reading of Section 9(c) is untenable for a number of fundamental reasons.

First, construing Section 9(c) to give the Secretary authority only over irrigation works that he builds and operates renders Section 9 internally inconsistent. Congress expressly approved the Pick-Sloan Plan in Section 9(a) and, as demonstrated above, that Plan clearly specified that the Secretary of the Interior was to exercise jurisdiction over all Basin storage reserved for irrigation, not just over irrigation projects constructed by the Bureau.

Second, the Eighth Circuit's construction of Section 9(c) directly contradicts Congress' intent, made plain in

the legislative history, that the reclamation laws apply to all irrigation features of all Basin reservoirs—not just to Bureau-built reservoirs or to irrigation "works" at Corps reservoirs.

Third, the Eighth Circuit's construction is completely contrary to the three policies motivating the adoption of Section 9—that the functional expertise of each agency should be applied at each reservoir; that maximum beneficial use of the water be achieved; and that in achieving that maximum beneficial use the two agencies remain flexible to meet changing circumstances. The ETSI contract furthers all three of these policies, while the Eighth Circuit's decision undermines them all.

Fourth, the Eighth Circuit ignored Congress' review and approval of the Secretary's long-standing construction of his authority. That review and approval, occurring both in the MOU hearings and in the 1982 amendments to the reclamation laws, made clear Congress' acceptance of the Secretary's marketing authority over all Basin irrigation storage.

Fifth, the Eighth Circuit's construction of the statute produces numerous anomalous results that Congress could not have intended. For example, under the Eighth Circuit's analysis, irrigation storage at Bureau-built reservoirs is subject to the reclamation laws, but such storage at Corps-built reservoirs is not. The Eighth Circuit suggested no reason why Congress would have made such a distinction; neither did it indicate what law, if any, *does* govern irrigation storage at Corps-built reservoirs.

Similarly, under the Eighth Circuit's approach, irrigation "works" may be subject to the reclamation laws, but irrigation storage is not; again, however, the Eighth Circuit suggests no reason why Congress would have drawn such a distinction, nor any hint of what law governs such irrigation storage if the reclamation laws do not. Plainly, the reclamation laws themselves make no such distinc-

tions, but instead provide comprehensive treatment for administering irrigation storage and irrigation works alike.

In short, under the Eighth Circuit's decision, the Secretary has been deprived of his Section 9(a) authority to administer the irrigation features of the main stem reservoirs, at least until some irrigation demand develops or the Secretary builds a pointless irrigation "work."[21] As a consequence, the water cannot be used for the other beneficial purposes authorized by the reclamation laws and contemplated in the Pick-Sloan Plan. In addition, the recoupment of costs allocated to irrigation—a central feature of reclamation law indisputably intended to apply to Lake Oahe—will be thwarted indefinitely. Clearly, Congress did not intend such results.

[21] The Eighth Circuit seemed to view this case as nothing more than a debate over which of two federal agencies is the appropriate marketing authority for irrigation water stored in Corps-operated reservoirs. The majority erroneously assumed that the Corps has such authority under Section 6 of the Act. In fact, however, virtually no water stored in the main stem reservoirs can be made available under Section 6. That section permits the Corps to contract only "for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the [Corps]: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses . . . ." 33 U.S.C. § 708 (1982). The described "surplus water" is either water never earmarked for a particular purpose, 90 Cong. Rec. 4133 (1944) (remarks of Rep. Curtis), or water not currently being used for any authorized project purpose. Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, § 7-3(c) (Jan. 29, 1982) (J.A. 207). The water ETSI contracted for is not "surplus" under either definition. It was originally earmarked for irrigation and, in the interim, runs through the turbines at the Oahe dam to generate hydroelectric power; both irrigation and power generation are authorized project purposes. For this reason, the Army has expressly determined that it is not free to market such water under Section 6 of the Act. J.A. 209-210. The Eighth Circuit's decision therefore contradicts the construction of the Act of both agencies charged with its administration.

Finally, even if this Court accepted the Eighth Circuit's view that the term "reclamation development" should be considered apart from all the other indications of Congress' intent, the irrigation storage at Lake Oahe still should be held to constitute such a "development." Oahe was built in accordance with the Bureau of Reclamation's Sloan Report with sufficient capacity to irrigate 750,000 acres of land in the James River Basin.[22] In other words, it is a much larger reservoir than would have been necessary had it been built to serve only a flood control function as originally envisioned in the Pick Report. In approving the Pick-Sloan Plan, Congress had before it cost allocation and repayment projections which anticipated that a substantial portion of its construction costs would be recovered under the repayment provisions of reclamation law. Indeed, the Sloan Report estimated that more than seventy-five percent of the benefits realized from the plan it proposed and more than forty percent of the repayment from the reimbursable features of the plan would be allocable to the irrigation features of the projects. S. Doc. 191, at 27 (App. 90a).[23] Furthermore,

---

[22] S. Doc. No. 191, at 115-16 (App. 91a-92a); S. Doc. No. 247, at 3 (App. 98a). In 1968, Congress appropriated funds for construction of the initial stage of what became known as the Oahe Unit, a project that would have provided for irrigation of 190,000 acres in the James River Basin. Pub. L. No. 88-442, 78 Stat. 446 (1964); Pub. L. No. 90-453, 82 Stat. 624 (1968). Construction began on the Oahe Unit, but the project was later suspended. In 1982, Congress authorized the Bureau to terminate the entire project. WEB Rural Water Development Project Act of 1982, Pub. L. No. 97-273, §§ 3a and 4, 96 Stat. 1181, 1182. As a result, none of the water storage provided in Lake Oahe for irrigation in the James River Basin has been used for that purpose, nor will it be for the foreseeable future.

[23] Of the 60,000,000 acre feet of storage planned for the main stem reservoirs, only 10,000,000 acre feet were necessary to meet the flood control objectives of the Pick-Sloan Plan and only another 10,000,000 acre feet of water were necessary to maintain navigation. The irrigation features of the reservoirs represented the largest single use for which storage was being allocated in the entire Plan. 1944 Senate Hearings at 670-74, 728-36.

at Lake Oahe alone, 18.1 percent of the project's total costs are allocated directly to irrigation. 128 Cong. Rec. 16610 (1982). In such circumstances, this significant irrigation-related undertaking at Oahe easily merits the characterization "reclamation development."

Accordingly, on no reasonable construction of Section 9 can the Eighth Circuit's analysis be sustained. Its judgment should be reversed and the Secretary's construction upheld.

II. The Secretary's Construction of His Section 9 Authority Was Reasonable and Therefore Entitled to Deference.

For the reasons previously stated, ETSI believes the Secretary's long-standing construction of Section 9 was clearly correct and for that reason should have been accepted by the Eighth Circuit. But even if the Court believes there is more than one plausible construction of Section 9, the Eighth Circuit erred in substituting its own construction for that of the Secretary. The Secretary was applying a statute that it is his duty to administer and as to which he has considerable experience administering. In such circumstances, so long as the Secretary's construction was *a reasonable* one—which it clearly was in this case—the Eighth Circuit was bound to follow it.

In *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), this Court held that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, . . . Congress has not directly addressed *the precise question at issue*, the court does not simply impose its own construction on the statute . . . . Rather, . . . the ques-

> tion for the court is whether the agency's answer is based on a permissible construction of the statute. [Footnotes omitted; emphasis added.]

This Court has reiterated the *Chevron* rule in numerous subsequent decisions. Thus, in *United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985), the Court held that, where an agency's interpretation does not conflict with the "expressed intent of Congress," judicial "review is *limited* to the question whether [the interpretation] is *reasonable*, in light of the language, policies, and legislative history of the Act . . . ." (Emphasis added). Similarly, in *United States* v. *City of Fulton*, 106 S. Ct. 1422, 1428 (1986), Justice Marshall wrote for a unanimous Court that "[w]e *must* uphold [an agency] interpretation if the statute yields up no *definitive* contrary legislative command and if the agencies' approach is a *reasonable* one." (Emphasis added).

These principles are plainly applicable to the present case. Under Section 9(c) of the Act, "the reclamation . . . developments to be undertaken by the Secretary . . . shall be governed by the Federal Reclamation laws . . . ." There can be no doubt that the Secretary of the Interior is charged with administering this provision, that he has construed the term "reclamation developments" to include the Oahe irrigation storage, and that the governing reclamation laws permit him to market that storage.

There also can be no doubt that Congress nowhere defined the term "reclamation developments" and nowhere addressed "the precise question" whether such developments should include stored irrigation water in the absence of irrigation works. Indeed, it is not surprising that this precise question was never addressed. When Congress approved the Pick-Sloan documents and their plan for Lake Oahe, it plainly contemplated that the stored irrigation water would in fact be used principally *for irrigation*, with municipal or industrial uses arising ancillary to irrigation projects. Consequently, Congress never

squarely addressed the appropriate disposition of the water in the unexpected event that the demand for irrigation and irrigation works at the main stem reservoirs never materialized.

Nevertheless, when the demand did not materialize, the Secretary was required to determine Congress' intent for the stored irrigation water in light of the terms, policies, and history of the Act. As described, he determined that Congress intended (or would have intended had it addressed the question) that the water be disposed of pursuant to the three policies that Congress *did* clearly articulate: (1) that all water in the Basin be put to its maximum beneficial use; (2) that cooperative jurisdiction with the Corps be exercised in order to promote that maximum beneficial use; and (3) that the Pick-Sloan Plan be flexibly applied to meet changing circumstances. Pursuant to those policies and the Secretary's construction of Section 9, he determined that he had authority to put the stored water to its then maximum beneficial use—to advance the development of Western energy resources and at the same time help recompense the Government for the cost of including irrigation storage in the reservoir. This was unquestionably a reasonable interpretation of the statute.

Accordingly, this case is a paradigm for application of *Chevron*. It presented the Secretary with a question "on which 'Congress did not actually have an intent,'" and as to which "'a court may not substitute its own construction . . . for a reasonable interpretation made by'" the Secretary. *Lukhard* v. *Reed*, 55 U.S.L.W. 4561, 4563 n.3 (U.S. Apr. 22, 1987) (quoting *Chevron*, 467 U.S. at 843, 844).[24] Nevertheless, the Eighth Circuit, based on its own "review of the Act and its legislative

---

[24] As Justice Blackmun stated in his concurring opinion in *Lukhard*, "[i]n a statutory area as complicated as this one, the administrative authorities are far more able than this Court to determine congressional intent in the light of experience in the field." 55 U.S.L.W. at 4565.

history," was "convince[d]" that the Secretary misperceived his statutory authority. Pet. App. 33a. It therefore rejected the Secretary's construction.

Contrary to the clear command of *Chevron*, however, the Eighth Circuit pointed to no evidence that Congress "ha[d] directly spoken to the precise question at issue," [25] nor to any "definitive . . . command" on that issue.[26] Neither did it consider whether the Secretary's construction of his Section 9 authority was *reasonable* and therefore binding on the courts. Instead, the Court of Appeals simply construed the statute on its own and then held that the Secretary's construction was entitled to no deference because his interpretation of his "statutory mandate" was *incorrect*.

The court justified this inversion of *Chevron* solely on the ground that "[t]he *Chevron* rule requires deference only where an agency reasonably construes the applicable statute *on a matter which is within its jurisdiction to decide*." Pet. App. 33a (emphasis added). Having first determined independently that the Secretary's "assertion of . . . authority" over the Oahe irrigation water was "beyond his statutory mandate," the court reasoned that the Secretary's contrary construction was "*not entitled to judicial deference*." *Id.* 33a-34a (emphasis added). Under that analysis, however, a court would be free to substitute its judgment for the agency's in *every* case where the agency's "jurisdiction" or the scope of its "statutory mandate" could be said to be at issue. There are very few agency decisions which could not be so characterized, as this Court's decisions in *Chevron* and its progeny clearly demonstrate.

For example, *Chevron* itself presented the question whether a permit system established under the Clean Air Act was applicable to certain state industrial plants. That applicability turned on the EPA's construction of

---

[25] *Chevron*, 467 U.S. at 842.

[26] *Fulton*, 106 S. Ct. at 1428.

the statutory term "stationary sources," an agency construction which this Court said was owed deference. 467 U.S. at 844-45, 864-66. Yet, under the Eighth Circuit's analysis, the EPA's construction could presumably have been ignored by the courts because it was determinative of the *jurisdictional* reach of the agency's authority.

Similarly, in *United States* v. *Riverside Bayview Homes, Inc.* the question was whether the Corps' jurisdiction over "navigable waters" under the Clean Water Act encompassed certain wetlands adjacent to bodies of water. Citing *Chevron*, this Court held that, where the Corps had determined that it had authority over such wetlands, the judiciary's role was "limited to the question whether it is reasonable . . . for the Corps *to exercise jurisdiction over* [*the*] *wetlands* . . . ." 106 S. Ct. at 461 (emphasis added). This was so even though the Court defined the issue as "a problem of *defining the bounds of* [*the agency's*] *regulatory authority.*" *Id.* at 462 (emphasis added). The Eighth Circuit's interpretation of *Chevron* simply cannot be squared with *Riverside Bayview Homes.*

Finally, in *Commodity Futures Trading Commission* v. *Schor*,[27] this Court expressly rejected the claim that "jurisdictional" issues are exempt from the deference requirement:

> [T]he Court of Appeals was incorrect to state on the facts of this case that the CFTC's expertise was not deserving of deference because of the 'statutory interpretation-jurisdictional' nature of the question at issue. An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with

---

[27] 106 S. Ct. 3245 (1986).

> enforcing; the agency's position, in such circumstances, is therefore due substantial deference.

106 S. Ct. at 3254-55 (citation omitted). The decision below is plainly at odds with this reasoning.[28]

Applying his experience and expertise regarding the application of the Flood Control Act and the reclamation laws to the Missouri Basin reservoirs, the Secretary has determined that disposition of the stored Oahe irrigation water pursuant to the reclamation laws is within his Section 9 authority. His determination is consistent with the history, purposes, and policies of the Act and is eminently reasonable. This Court should therefore defer to that determination.

III. The Remaining Provisions of the Flood Control Act Support the Secretary's Interpretation of the Scope of His Authority Under Section 9.

Ironically, while the Eighth Circuit majority gave little consideration to the provisions, policies, and history of Section 9—or to the Secretary's construction thereof—it paid considerable attention to certain generally applicable provisions of the Flood Control Act. Properly understood, however, these general provisions fully support the Secretary's interpretation of the scope of his authority.

---

[28] *See also United States* v. *City of Fulton* (finding the Secretary of Energy's interpretation that he had authority to implement interim power rate increases under Section 5 of the 1944 Flood Control Act "a reasonable accommodation of the policies underlying that Act," 106 S. Ct. at 1430, the Court deferred to that interpretation); *Federal Deposit Ins. Corp.* v. *Philadelphia Gear Corp.*, 106 S. Ct. 1931, 1934 (1986) (reversing the Tenth Circuit's conclusion that certain standby letters of credit fell within FDIC's jurisdiction over "deposits"); *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 118 (1985) (reversing the Third Circuit's conclusion that EPA Secretary had no statutory authority to grant "fundamentally different factor" variances).

A. Section 8 of the Flood Control Act Confirms that Congress Intended the Reclamation Laws to Govern Irrigation Storage at Corps Reservoirs.

Section 8 of the Act authorizes the Secretary of the Interior "[h]ereafter" "to construct, operate, and maintain under the provisions of the Federal reclamation laws . . . additional works . . . for irrigation purposes" at any Corps-built reservoir upon a finding by the Corps that the reservoir "may be utilized for irrigation purposes" and after authorization by Congress.[29] The Eighth Circuit suggested that if the Secretary had the authority he claimed under Section 9, Section 8 would be superfluous. Pet. App. 26a-31a. This suggestion misconstrues both the language and history of Section 8.

The language of Section 8 quoted by the majority applies to Corps projects *only* where the original Pick-Sloan plans did *not* include a determination that the project could also serve reclamation functions *and* where the Secretary of the Interior proposes to construct "additional works." Neither circumstance exists in this case.

The Pick-Sloan Plan specifically determined that all main stem Missouri Basin reservoirs would be multiple-purpose projects and that Lake Oahe in particular could serve a substantial irrigation function. Nothing in the legislative history of the Flood Control Act remotely suggests that Congress expected the Bureau to repeat the five-year effort that had produced the Sloan Report before exercising jurisdiction over the storage reserved in Lake Oahe for irrigation. Just the contrary is true.

Senator Overton, a principal sponsor of the Act, emphasized in the floor debate that "every one of [the Pick-Sloan] projects has undergone careful scrutiny by the engineers of the Bureau of Reclamation or by the Army engineers." 90 Cong. Rec. 8375 (1944). Likewise in the Senate hearings, all concerned expressed the strong desire to avoid any amendments to the Act that would neces-

---

[29] The full text of Section 8 appears at Pet. App. 82a-83a.

sitate reinvestigation of proposed projects that had already been thoroughly analyzed. 1944 Senate Hearings at 548, 692-94. By adopting the Plan, Congress authorized the construction of Lake Oahe with substantial irrigation storage and with a significant portion of its costs allocated to reclamation functions. S. Doc. No. 247, at 3 (App. 98a). All the determinations that Section 8 might otherwise have required had already been made.

The majority's opinion further ignores the first word of Section 8: it applies only to determinations made "hereafter." The Pick-Sloan determinations approved in Section 9 had already been made when Section 8 was adopted. Similarly, Section 8 by its terms applies only to "additional works" constructed to serve reclamation functions.[30] Here, because the Secretary contemplated no new "works," the section simply has no bearing.

Furthermore, contrary to the Eighth Circuit's conclusion, the legislative history of Section 8 demonstrates that the intent underlying Section 8 is entirely consistent with the Secretary's interpretation of Section 9. As the Eighth Circuit noted, the current language of Section 8 reflects a change from its original form.[31]

---

[30] One of the principal objectives of Section 8 was to ensure that, before committing federal funds to undertake major water projects, the Secretary of the Interior would be subject to the same requirement of congressional authorization to which the Corps had long been subject. 90 Cong. Rec. 8675 (1944) (remarks of Senator Overton).

[31] Section 8 of the Act originated as Section 6 of the House bill. To avoid confusion, that section will be referred to here as Section 8. As it originally passed in the House, Section 8 would have provided:

> Hereafter, whenever in the opinion of the Secretary of [the Army] and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary of [the Army] can be consistently used for reclamation of arid lands, *it shall be the duty of the Secretary of the Interior to prescribe regulations for the use of the storage available for such purpose*, and the operation of any such project shall be in

Initially, the section provided that, where storage was available at Corps-operated reservoirs, "it shall be the duty of the Secretary of the Interior to prescribe regulations under existing reclamation law for the use of the storage available for such purpose." Pet. App. 26a n.18. The Eighth Circuit majority conceded that "[t]his language arguably encompassed a broader sphere of authority for the Secretary of the Interior, one more consonant with that for which he argues today." *Id.* 26a. The majority found, however, that the final version of Section 8 diminished the Secretary's authority. This finding misapprehends the reason for the change.

The change was actually proposed by the Secretary himself for technical reasons, 1944 Senate Hearings at 313, and there is not the slightest suggestion in the legislative history that anyone perceived it as a narrower grant of authority to Interior. In his oral testimony, the Secretary explained that his amendment to Section 8 was designed to clarify that reclamation law "in all pertinent respects"—including most particularly the Department's contracting authority—would apply to irrigation storage at Corps reservoirs:

> *The revision of section [8] recommended in my report . . . is purely for purposes of clarification.* That section as it now stands provides for the application of the Federal reclamation laws to the irrigation features of Army reservoir projects. However, *it is not drafted in a way that ties in with the basic provisions of the reclamation laws in all pertinent respects. For example, it speaks of those laws as though they involved merely the imposition of regulations, whereas in truth they are largely designed*

---

accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said stored water; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts.

H.R. Rep. No. 1309, 78th Cong., 2d Sess. 53 (1944) (emphasis added).

> *to authorize a system of contractual relationships.* It disregards the problem of allocating costs for multiple-purpose facilities serving other uses in addition to irrigation.

1944 Senate Hearings at 458 (emphasis added).

Congress was certainly aware that reclamation law empowers the Secretary of the Interior to contract for non-irrigation uses of water. *See* discussion, *supra*, at 18-19. The foregoing testimony clearly reflects that Secretary Ickes was seeking to preserve, not cut off, that power with respect to the irrigation features of Corps-operated reservoirs. And his amendment was accepted precisely for the reasons he offered in support of it. S. Rep. No. 1030, 78th Cong., 2d Sess. 4 (1944).

The testimony of Colonel Reber likewise demonstrates the Corps' contemporaneous understanding that the amended Section 8 did not restrict the Secretary's authority at Corps-built reservoirs:

> [S]ection [8] as it is written here, *making Federal reclamation laws applicable to the irrigation features of these projects, certainly furnishes the same amount of protection to the irrigation interests as they have in other parts of the country today*, and it seems to me that the adoption of this particular language, putting the Federal reclamation laws into application on the irrigation features of our projects, should go a long way toward settling this controversy.

1944 Senate Hearings at 737 (emphasis added). Moreover, when the conference report reached the Senate floor, Senator Overton emphasized, "[n]o project in this bill which may include *irrigation features* is exempted from the reclamation laws." 90 Cong. Rec. 9264 (1944) (emphasis added). Thus, far from contradicting the Secretary's construction of his authority to invoke the reclamation laws under Section 9(c), the history of Section 8 confirms that those laws were to apply to all irrigation

features contemplated by the Act, not merely irrigation *works*.[32]

Thus, both the language of Section 8 and its legislative history reveal that the Eighth Circuit flatly misinterpreted that provision. Read correctly, the section supports the Secretary's interpretation of the Act.

B. The Legislative History of Section 6 of the Flood Control Act Is Not Contrary to the Secretary's Interpretation.

To sustain its construction of Section 9, the Eighth Circuit majority also pointed to the failure of Congress to adopt a proposal made by Secretary Ickes to amend Section 6 of the Act, 33 U.S.C. § 708 (1982).[33] That Section authorizes the Corps to market "surplus water" for domestic and industrial purposes at the reservoirs it operates. Secretary Ickes proposed adding a proviso that "the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pur-

---

[32] The House debate on the original version of Section 8 further confirms that the section gave the Bureau of Reclamation full authority over the storage provided for irrigation in reservoirs built by the Corps. Representative Curtis, for example, stated plainly:

> The thing that we have done in this bill is to state that *in any reservoir where there is storage space available for irrigating farm lands that the regulation of that shall be turned over to the Bureau of Reclamation*, which is a concession on the part of the Army. It is a definite gain on the part of the Bureau, and I believe the Bureau of Reclamation can be trusted to recognize both State rights and the individual rights of the owners of the water.

90 Cong. Rec. 4134 (1944) (emphasis added). He subsequently reemphasized the Secretary's authority, noting: "We have stated in this bill that *control with reference to the available space for irrigation water shall be exercised by the Bureau of Reclamation*. *Id.* (emphasis added).

[33] Section 6 originated as Section 4 of the House bill. For convenience, both sections will be referred to as Section 6. The full text of Section 6 appears at Pet. App. 81a-82a.

suant to Section [6] of this Act." 1944 Senate Hearings at 312-13. In offering the amendment, the Secretary explained:

> While it is true that section [6] does not involve reclamation but covers merely the sale of water for domestic and industrial uses, it is true also that, in those situations where the disposition of water for irrigation purposes will be accomplished under the Federal reclamation laws, the disposition of water for domestic and industrial purposes should be accomplished under the same statutes in order to achieve efficient and economical administration.

Id. at 312.

When the Secretary appeared before the Senate Committee to testify in favor of the amendment, no opposition was expressed. Rather, Senator Overton inquired whether a proposed amendment to the companion rivers and harbors bill "carries out the purpose that you had in mind." *Id.* at 458. Secretary Ickes was not sufficiently familiar with the rivers and harbors bill amendment to respond, but it appears that, thereafter, the Secretary dropped his proposal. It further appears that the amendment Senator Overton referred to was very similar to Secretary Ickes' proposed Section 8 of the final bill.[34]

The most sensible interpretation of this history is that the Secretary withdrew his proposed amendment to Section 6 because the final version of Section 8 adequately accomplished his objectives. By contrast, nothing in this history reflects an intent to *deprive* Interior of all industrial water marketing authority over the irrigation storage in Corps reservoirs.

Indeed, the most this history reflects is an intent to refuse the Secretary *exclusive* industrial water marketing authority. The principal purpose of Section 6 was to give

---

[34] *See* 90 Cong. Rec. 8674, 8675 (1944); H.R. Conf. Rep. 2070, 78th Cong., 2d Sess. 7 (1944).

the Corps water marketing authority that it had never had, but that the Bureau of Reclamation had long enjoyed. 90 Cong. Rec. 4125 (1944) (remarks of Representative Whittington). Representative Curtis further emphasized that Section 6 was not intended to address the jurisdiction of the Bureau of Reclamation at all. Responding to an inquiry about the treatment of irrigation waters under the House version of that section, he stated: "there is a specific section dealing with irrigation regulations and that is section [8] which is a later section in the bill. This would indicate to me that section [6] would not be controlling in reference to irrigation waters." *Id.* at 4133. If, in expanding the authority of the Corps Congress intended to limit Interior's authority, that intent nowhere appears.

The sensible reading of Section 6—and the one that causes that section to harmonize with Section 9—is to accord Section 6 the construction indicated by its legislative history: it was intended to give the Corps the authority that Interior already had under Section 9.[35]

C. Section 7's Limited Grant of Authority to the Corps over Storage for Navigation and Flood Control Supports the Secretary's Conclusion that He Has Authority over Irrigation Storage.

Finally, the Eighth Circuit briefly addressed Section 7 to find support for its position. That Section requires the

---

[35] It is settled that, if possible, the Court shall read the two Sections to harmonize, not conflict. *E.g., Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947)). It is also settled that if the general provisions of Section 6 were indeed thought to conflict with the specific provisions of Section 9, the latter provision would control. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (quoting *Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932)); *Tanksley* v. *United States*, 321 F.2d 647 (8th Cir. 1963). *See generally* 2A N. Singer, *Sutherland: Statutes & Statutory Construction* § 46.05 (Sands 4th ed. 1984).

Secretary of the Army to "prescribe regulations for the use of storage allocated for flood control or navigation." [36] The Eighth Circuit concluded that Congress' failure to correspondingly authorize the Secretary of the Interior to regulate irrigation storage meant by implication that the Secretary did not have that authority. As Judge Bright noted, however, the more logical implication is that Congress did not add a parallel provision because it believed the Secretary already possessed the requisite power through Section 9 of the Act and 9(c) of the Reclamation Act. The two Secretaries thus have comparable authority, and all of the storage in Basin reservoirs falls under the jurisdiction of either Interior or the Army.

By contrast, under the majority's reading, Section 7 would contradict Section 9's intention to afford each agency functional authority in its area of expertise. Indeed, under the majority's view, excess irrigation storage would fall outside the jurisdiction of *any* agency and could not be disposed of *at all*. There is no implication anywhere in the Act that Congress intended such an absurd result.

Therefore, to the extent the other provisions of the Flood Control Act are pertinent to the Secretary's Section 9 authority, those provisions confirm his authority.

---

[36] The full text of Section 7 appears at Pet. App. 82a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
BARBARA L. SLOAN
HOGAN & HARTSON
(a partnership including
professional corporations)
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6544
Counsel for Petitioner
ETSI Pipeline Project

* Counsel of Record

APPENDICES

APPENDIX A

78th Congress, 2d Session . . . . House Document No. 475

MISSOURI RIVER BASIN

LETTER

FROM

THE SECRETARY OF WAR

TRANSMITTING

A Letter From the Chief of Engineers, United States Army, Dated December 31, 1943, Submitting A Report, Together With Accompanying Papers and Illustrations, on a Review of Reports on the Missouri River, for Flood Control Along the Main Stem From Sioux City, Iowa, to the Mouth, Requested by a Resolution of the Committee on Flood Control, House of Representatives, Adopted on May 13, 1943

[LOGO]

MARCH 2, 1944.—Referred to the Committee on Flood Control and ordered to be printed with two illustrations

---

United States

Government Printing Office

Washington: 1944

LETTER OF TRANSMITTAL

WAR DEPARTMENT,
Washington, February 28, 1944.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

DEAR MR. SPEAKER: I am transmitting herewith a report dated December 31, 1943, from the Chief of Engineers, United States Army, together with accompanying papers and an illustration, on a review of reports on the Missouri River, with a view to flood control along the main stem from Sioux City, Iowa, to its mouth, requested by a resolution of the Committee on Flood Control, House of Representatives, adopted on May 13, 1943.

In view, however, of the large quantities of materials, equipment, and manpower which would be required on the construction of the projects proposed in the report, and since there is no presently indicated necessity for them in the war program, the Department considers that initiation of construction should be deferred until after the war or until essentiality in the war effort has been established.

By letter of February 16, 1944, the Bureau of the Budget advises that there would be no objection to the submission of the report to Congress for its information, but that the authorization of the improvements recommended by the Chief of Engineers would not be in accord with the program of the President, at least at the present. Further advice as to the relationship to the program of the President, of the improvements considered in the report, will be given by the Bureau of the Budget after review and consideration by that Bureau of reports of other Federal agencies and additional material to be submitted by the Chief of Engineers. A copy of the letter of the Bureau of the Budget containing its comments is enclosed.

Respectfully,

HENRY L. STIMSON,
Secretary of War.

LETTER OF THE CHIEF OF ENGINEERS, UNITED STATES ARMY

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, December 31, 1943.

The CHAIRMAN, COMMITTEE OF FLOOD CONTROL,
House of Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN: 1. The Committee on Flood Control of the House of Representatives, by resolution adopted on May 13, 1943, requested the Board of Engineers for Rivers and Harbors to review the reports on the Missouri River contained in House Document No. 238, Seventy-third Congress, second session, and House Document No. 821, Seventy-sixth Congress, third session, with a view to determining whether any modification should be made therein at this time with respect to flood control along the main stem of the Missouri River from Sioux City, Iowa, to its mouth. I enclose the report of the Board in response thereto.

2. The Board concurs in the report of the division engineer and recommends modification of the approved general comprehensive plan for flood control and other purposes in the Missouri River Basin to include 12 additional multiple-purpose reservoirs, works to divert water to the Devils Lake and James River Basin regions, and a system of levees and appurtenant works along the Missouri River between Sioux City and the mouth, in general accordance with the plan of the division engineer, as shown on the accompanying map, with such modifications thereof and changes therein as the Secretary of War and Chief of Engineers may find advisable, at an estimated cost to the United States of $481,600,000 for these additional works, with local cooperation as specified in the Board's report. The Board further recommends that in

addition to previous authorizations of funds there be authorized, for appropriation, funds sufficient to provide for initiation and prosecution of the expanded general comprehensive plan in logical steps.

3. The reports of the division engineer and the Board were referred to the Bureau of Reclamation, the Federal Power Commission, and the Department of Agriculture for their comments. Several conferences have also been held both in Washington and in the field between representatives of these agencies and of the Corps of Engineers. The views and comments of the three agencies are contained in full in the letters of reply which accompany this report.

4. The Department of Agriculture states that, although its responsibilities do not embrace the construction of the types of engineering works discussed in the report, the benefits of the proposed program for flood control, irrigation, power, navigation, wildlife, recreation, and other multiple-purpose developments are of great concern to the interests of agriculture in this important area and will have a direct bearing on the use of the rural resources of the basin. Both the droughts of recent years and the disastrous floods of 1943 demonstrate the need for such a comprehensive plan of multiple-purpose regulation and development of the upper Missouri River. The Department of Agriculture is of the opinion that the proposal of the division engineer and of the Board of progressive step-by-step cooperative development is a constructive approach to the solution of the problems of water use in the Missouri River Basin and it assures its full cooperation in the accomplishment of this plan. That Department believes that it may be of particular assistance through its programs for water-flow retardation and soil-erosion prevention which may serve as valuable supplements to the comprehensive program.

5. The Federal Power Commission is of the opinion that the proposed comprehensive plan should go far to-

ward resolving present conflicts of interest in the use of the water resources of the basin through the construction of additional storage reservoirs. These conflicts now arise because of insufficiency of usable water, under present conditions of basin development, to meet all projected water requirements. The Commission approves the recognition in the report of the importance of cooperation among governmental agencies and local interests in the development of the program and it desires to cooperate further in the working out of details. It considers that the Missouri Basin affords a unique opportunity for such cooperative procedure, which should be directed to assure the maximum benefits possible under the multiple-use concept. The Commission is convinced that power development will prove an important factor in the Missouri Basin program and believes that at least 10,000,000,000 kilowatt-hours of additional hydroelectric energy per year may eventually be developed without sacrifice of other benefits to the region from the use of its water resources. The Commission recommends that current authorizations for flood control be broadened to permit construction for multiple-purpose use and that the plan of the division engineer and the Board for undertaking the development of the Missouri River on a step-by-step basis be authorized, with latitude for such modification as changing conditions show to be desirable.

6. The Bureau of Reclamation believes that the development of a truly comprehensive plan of improvement for the Missouri River Basin can best be accomplished through integration of the studies and investigations of the Corps of Engineers with those of the Bureau, each agency operating in its respective field as determined by existing law. A proportionate share of all the benefits from an integrated basin program should, in the opinion of the Bureau, be applied to each feature of the program in advance of construction, and all reservoirs, including Fort Peck, should be operated to obtain the maximum benefit from all water uses, with preference being given

to functions which contribute most to the welfare and livelihood of the greatest number of people. The Bureau recommends adoption of the policy that works of improvement under a comprehensive plan should be constructed, maintained, and operated by the agency with the dominant interest under existing law, after appropriate consultation with other agencies definitely concerned with phases other than that interest. The Bureau considers the plan of improvement proposed in the reports of the division engineer and the Board of Engineers for Rivers and Harbors, adequate for flood control along the lower river, but calls attention to flood problems on the upper tributaries for which a solution is not provided. It is the opinion of the Bureau that reservoirs on the Yellowstone River and tributaries should be built primarily for irrigation after coordination with plans now being prepared by the Bureau, and that the door should be left open for possible changes in the number and size of the proposed main-stem reservoirs and in plans for diversions into the Dakotas. If the improvements proposed by the division engineer and the Board are carried out in accordance with the views of the Bureau of Reclamation, that agency sees no reason why these improvements would not fit in a comprehensive plan for the Missouri River Basin.

7. It is evident that all the Federal agencies concerned agree that the maximum feasible multiple-purpose use of water and the broadest economic program of reservoirs for that type of use are the primary principles on which the planned development of the water resources of the Missouri River Valley should be based. It is equally evident that to accomplish this type of development, the details of planning must be worked out in a progressive manner through the correlation and coordinated efforts of all agencies, Federal, State, and local, concerned with these resources. Due allowance must be made for any changed conditions that may arise in the future. However, I do not consider it practicable to make final allocation of proportionate costs in advance of construction.

8. The appropriate distribution of proper benefits over the entire valley is a definite part of the plan proposed in the report of the division engineer and the Board, not only to those projects recommended in the report itself, but also to any others that may legally be proposed by other agencies. That report also contemplates that the uses of presently authorized and existing multiple-purpose reservoirs will be progressively broadened and reapportioned as additional water is stored by the dams proposed in the expanded plan. The adjustment of water use to meet the changing needs of the Missouri Basin as a whole can and will be made as the comprehensive development proceeds step-by-step toward ultimate accomplishment. When completed the basin plan will be operated for maximum multiple-purpose use. Thus preference can be given to the functions which contribute most significantly to the welfare and livelihood of the people of various parts of the basin, and at the same time adequate steps can be taken to meet new economic situations that may arise in the future.

9. The Corps of Engineers recognizes the broad and important interests and responsibilities of the Bureau of Reclamation in the Missouri River Basin and will continue to plan its work in that basin so as to coordinate fully the activities of both agencies. There is no question that reservoirs on the Yellowstone River and its tributaries will furnish an important contribution to water conservation in the upper portion of the Missouri Valley. The two reservoirs proposed in the report of the division engineer and of the Board, augmented by such additional projects as the Bureau may find advisable, should be planned, with modifications if necessary, to provide the maximum feasible storage for conservation purposes. Many of the reservoirs of the proposed system will produce major benefits to conservation and irrigation, notably in the upper basin. Tributary reservoirs should, when advisable from the standpoint of basin-wide development,

be constructed, operated, and maintained by the agency with the dominant interest under existing law. It is essential, however, that the main-stem projects be built, operated, and maintained by the Corps of Engineers, and that the utilization of storage reserved for flood control in all multiple-purpose reservoirs on tributaries be in accordance with regulations prescribed by the Secretary of War, in order to secure necessary unified control of the flood waters of the Missouri River itself, and to coordinate reservoir operation in this basin with that of other basins to obtain the maximum practical results for flood control on the Mississippi River. Conversely, utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior.

10. The amount of storage in the main-stem reservoirs and the location and size of these reservoirs is of vital importance to the ultimate development of the entire basin. I am convinced in the light of all information now available that the plan of the division engineer and the Board provides a flexible basis for securing that storage and obtaining the full multiple-purpose use of the waters of the Missouri Valley. The plan contemplates further expansion with a view to solving the flood and other problems in the upper tributary basins. Many of these solutions will doubtless be accomplished through the construction, by appropriate agencies, of additional multiple-purpose reservoirs on those tributaries and headwater streams.

11. The Department recognizes water-flow retardation, soil-erosion prevention, and production of hydroelectric power as important parts of the Missouri Basin program. The generation of power, in multiple-purpose projects now authorized for flood control and in those proposed in the expanded plan of development, is a definite part of the recommended program. Plans for the production, transmission, and sale of hydroelectric power should be

worked out with the cooperation of the Federal Power Commission. Installation of power facilities so as to meet the economic needs of the Missouri Basin should be approved from time to time by the Secretary of War upon recommendations by the Federal Power Commission and the Chief of Engineers.

12. The proposed reservoirs will inundate Indian lands at several points. The estimates submitted on the over-all cost of the projects include funds to cover the cost of taking such lands and buildings, including relocation of burial grounds. It is to be understood, therefore, that approval of this plan includes authority for the Indians through their tribal councils, with the approval of the Secretary of the Interior, to convey and relinquish such property to the United States, and authority for the Secretary of War to enter into appropriate agreements with the Secretary of the Interior and the Indian tribes concerned for the payment of the fair value of the property taken, or for the contribution of a sum approximating such value toward locating or constructing or toward relocating or reconstructing buildings, works, facilities, or water projects in the vicinity of the Missouri River or its tributaries.

13. In summary, I believe that the expanded plan of development for the Missouri River Basin as recommended by the division engineer and the Board, establishes a broad framework for comprehensive basin-wide improvements that will derive the maximum benefits from the full multiple-purpose use of the water resources of that basin. That plan is flexible in that it proposes sufficient latitude to permit such modifications thereof and changes therein as may be found advisable, and it should be augmented by appropriate work of other agencies duly constituted by law to perform such work. Thus there are no problems of water use that cannot be satisfactorily solved with the full cooperation of all water-use agencies as the over-all plan of improvement is placed under construction.

14. This comprehensive plan should be approved now and at least the first phase of development authorized to be prosecuted in the same manner as that prescribed by existing law for similar comprehensive plans for large river basins. Approval at this time will permit details to be worked out through coordination and cooperation with all other agencies concerned and will enable working plans to be prepared so that construction can be initiated expeditiously and prosecuted with efficiency and dispatch throughout the post-war period.

15. I have considered carefully the reports of the division engineer and the Board of Engineers and the statements thereon made by the three afore-mentioned Federal agencies. I concur with the Board of Engineers in approving the plans of the division engineer and I recommend modification of the general comprehensive plan for the Missouri River Basin substantially in accordance with the plans of the division engineer for flood control, irrigation, power development, navigation, and other purposes, with such modifications thereof and changes therein as the Secretary of War and Chief of Engineers may from time to time find advisable, at an estimated cost to the United States of $481,600,000 for additional works; subject to the conditions that local interests provide without cost to the United States all land, easements, and rights-of-way necessary for construction of levee units and appurtenant works and maintain the levee units and appurtenant works after completion; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs. It is further recommended that in addition to previous authorizations of funds there be authorized for appropriation, funds sufficient to provide for initiation and prosecution of the expanded general comprehensive plan in logical steps.

Very truly yours,

E. REYBOLD,
Major General, Chief of Engineers.

COMMENTS OF THE BUREAU OF RECLAMATION

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, D.C., December 17, 1943.

Maj. Gen. E. REYBOLD,
Chief of Engineers, War Department.

DEAR GENERAL REYBOLD: It have studied carefully the report of the Board of Engineers for Rivers and Harbors, dated August 23, 1943, on the subject of the Missouri River, mouth to Sioux City, Iowa, upon which, in your letter of August 28, 1943, you requested the Bureau of Reclamation to make comments.

A PLAN FOR THE WHOLE BASIN

Primarily, the Bureau of Reclamation desires to emphasize that the plan for the Missouri Basin initially presented to the Congress should be truly comprehensive in adequately providing not only for the control of floods and the improvement of navigation, but also for full development of irrigation, hydroelectric power production, and all other beneficial uses of water. The criterion for the design of the plan, and of its component parts, should be whether it will secure that management of the waters of the Missouri River which is most beneficial to the residents of the basin.

The report of the Board of Rivers and Harbors, in accordance with the general congressional authorization to the Corps of Engineers, is directed principally toward flood control and navigation improvement. A report on the Missouri River Basin, based on over 5 years of intensive investigations, is currently being prepared by the Bureau of Reclamation for completion this spring. That report, likewise in accordance with the general congressional authorization to the Bureau of Reclamation, is directed primarily toward the development of irrigation,

hydroelectric power production, and other beneficial uses of water. I believe that you will agree that a truly comprehensive plan can be developed best through integration of these two approaches.

GOVERNING PRINCIPLES

The development of such a comprehensive plan involves adjustment of many factors of flood control, navigation, irrigation, hydroelectric power production, and numerous other functions of water conservation and management. These adjustments in a unified program can be accomplished satisfactorily only if certain principles are recognized as fundamental in the control and utilization of the waters of the Missouri River. Likewise certain principles of administration are indicated to assure effective, coordinated, and economical planning and execution of the program. I am taking this occasion to express the views of the Bureau of Reclamation on these matters, since they are the basis of my specific comments on the plan that you have presented. I also recommend that these principles be incorporated into whatever authorizing legislation may be enacted by the Congress. If these principles govern, and if the specific comments I make later in this letter are satisfied, then there remains no reason why the work proposed by the report of the Board of Rivers and Harbors, as thus modified, would not fit the comprehensive plan for the basin. There would then be no necessity for delaying the first phase of construction for further integration with later reports. Projects of the Bureau of Reclamation, as authorized by Congress, likewise would be integral with the comprehensive plan. The principles are enunciated below:

1. It is recognized that a sound program for the river subbasins of the Missouri comprehends a wide variety of functions, including but not limited to flood control, navigation, irrigation, restoration of surface and ground water levels, hydroelectric pro-

duction, pollution abatement, fish and wildlife preservation and recreation. In many, if not all, portions of the entire Missouri watershed some, many, or all of these functions are closely interrelated. In practice, programs for the component subbasins will be developed in several stages each of which should include provision for suitable features necessary for the interrelated functions such as flood control, navigation, irrigation, power production, etc., that are then present.

2. In conformity, with that principle, justification procedure should provide for applying the sum of all of the benefits deriving from such an integrated basis program to all of the features included in it. The final allocation of proportionate costs among the various multiple benefits that will accrue from any one feature or group of features should, therefore, be made jointly and reported to the Congress in concert by the Corps of Engineers, the Bureau of Reclamations, and the Federal Power Commission. These allocations should be reported in advance of the start of construction of any group of related features.

3. In planning the control and utilization of the waters of the Missouri Basin, the widest range of multiple benefits should be sought in each feature or group of features. All reservoirs included in the comprehensive plan, including Fort Peck, should be operated to obtain the maximum benefits in common for flood control, navigation, irrigation, power generation, and other water-conservation activities, including, but not limited to, utilization for fish and wildlife preservation, recreation, pollution abatement, maintenance of surface and ground water levels, silt control, and domestic and industrial purposes. To the extent, however, that several functions

of water control and utilization are conflicting, preference should be given to functions which contribute most significantly to the welfare and livelihood of the largest number of people. It is, for example, the view of the Bureau of Reclamation, that the waters of the Missouri River and its tributaries west of or entering above Sioux City are more useful to more people if utilized for domestic, agricultural, and industrial purposes than for navigation-improvement purposes. To the extent that these uses are competitive, domestic, agricultural, and industrial uses should have preference.

4. The Corps of Engineers should construct, operate, and maintain any feature in which flood control and navigation are dominant considerations, and the Bureau of Reclamation should construct, operate, and maintain any feature in which the functions of irrigation, restoration of surface and ground water levels, and power are dominant. To the extent that irrigation, restoration of surface and ground water levels and power are involved in the construction, operation, and maintenance of features in which flood control and navigation are dominant, the Corps of Engineers would advise and consult with the Bureau of Reclamation in the construction, operation, and maintenance of such features; and to the extent that flood control and navigation are involved in features in which irrigation, restoration of surface and ground water levels, and power are dominant, the Bureau of Reclamation would consult and advise with the Corps of Engineers in the construction, operation, and maintenance of such features.

5. The main-stem reservoirs below Fort Peck dam as described in the report of the Board of Rivers and Harbors and as finally authorized, because of their peculiarly close relationship with flood control and navigation below Sioux City, should be constructed,

operated, and maintained by the Corps of Engineers. The corps should, however, consult with the Bureau of Reclamation in advance of designing or constructing the necessary dams in order that the plan, purposefully rendered flexible in the report of the Board of Rivers and Harbors, will be adjusted to the needs of irrigation and power as they are developed by the Bureau of Reclamation in North Dakota and South Dakota and, if and when appropriate, other States of the arid and semiarid zone.

RECLAMATION'S INTEREST

For the purpose of indicating the extent of the interests of the Bureau of Reclamation in the Missouri River Basin, you may find illuminating data developed by our studies. At the present time there are 4,185,000 acres of land irrigated in the entire basin, of which 555,000 are in Federal projects. The irrigation works serving this land represent investments totaling approximately $200,000,000 of which $61,753,000 are in Federal projects. At present there are 1,342 water-storage reservoirs in the basin, including 11 that principally serve for power generation. Exclusive of the Fort Peck reservoir, which has a capacity of 19,412,000 acre-feet, these reservoirs have a combined capacity of 8,116,000 acre-feet of water. At present there are hydroelectric plants in the basin of a total installed capacity of 461,383 kilowatts, of which about 100,000 kilowatts are in Federal power plants.

Our studies indicate that an additional 4,400,000 acres of land in the basin can be irrigated, 2,300,000 acres from the main stream and the remainder from its tributaries, through the construction of some 90 additional reservoirs and related irrigation works. These studies indicate also that an additional 952,000 kilowatts of hydroelectric power can be developed through utilizing head created at some of the new reservoirs.

In 1940, the value of all crops produced in the 7 arid and semiarid States of the basin was $444,192,000. Our studies indicate that through full irrigation development of the basin additional crops with a value of $100,500,000 per annum can be produced. The significance of this to the 4,699,781 people who live in the States that are arid and semiarid, at least in part, in the Missouri River Basin, is not found entirely in the fact that the annual increase would be nearly equal to one-fourth of their entire agricultural income in 1940. The increase in stability that would be provided would be the major consideration. The effects of droughts, which in the past decade caused a net loss of 302,314 in the population of the basin, would be materially ameliorated when such droughts reoccur, as they will in the future. Our estimates are that more than 350,000 persons would find stable farm homes on the newly irrigated land alone. It is obviously important, when these facts are considered, that the irrigation possibilities be realized.

Much of the water that will be used in some parts of the basin in the irrigation of lands must be lifted by pumps to the canals. The hydroelectric power that is possible of development must be closely integrated in the irrigation plan or many possibilities never can be realized. The potential power, of course, will open important commercial and industrial avenues that will lead the whole area to new developments, which, in their degree, also will contribute to new prosperity and added stability.

Directly associated, also, with the irrigation development will be the restoration of surface and ground-water levels through diversion of water from the main stream and spreading it through canals. The problem of restoring Devils Lake will thus be met, and ways will be opened to attack the problem of restoration of the ground water in the North Dakota sandstone strata that is the source of supply of most of the domestic wells in several States. Diverted water will assist also in ameliorating pollution

problems at nearly a score of cities in North Dakota, South Dakota, and Minnesota.

The Bureau of Reclamation has developed an inventory of irrigation projects that is more nearly complete than exhibit C of your report of September 30, 1933, House Document No. 238, Seventy-third Congress, second session. For the information of the corps and those who may be interested in the plans for the Missouri Basin that we are developing, I am attaching our map of proposed Missouri River Basin developments. This map is not complete as to irrigation projects of less than 1,000 acres in area. The reservoirs shown to be under consideration by this map, in a number of instances, will be useful for the production of power in addition to irrigation, and in many instances they will have appreciable, if not major, flood-control contributions to make.

SPECIFIC COMMENTS

In the light of the discussion that has preceded, I offer the following comment on the report of the Board of Rivers and Harbors that you have submitted:

A. The authorized and proposed reservoirs would provide adequate flood control, I agree, on the Republican, Kansas, Osage, and Gasconade Rivers and on Cherry Creek through the city of Denver. Construction of the separate projects in these basins should be undertaken by the agency which has the dominant interest, as determined by the policy suggested in subparagraph numbered 4 of this letter.

B. The Boysen and Lower Canyon reservoirs that are proposed, on the other hand, I believe will not provide relief from the damaging ice-jam floods along the Yellowstone River. Since they control too little run-off to be very effective in reducing flood peaks below Sioux City, I question that their construction should be authorized with that purpose only in mind. They should not be authorized for construction and subsequent use for flood-control and navigation pur-

poses below Sioux City in advance of a coordinated study and report on the Yellowstone and its tributaries in which this Bureau participates. The interests of irrigation in Wyoming and Montana are likely to be intimately affected by these two reservoirs, which should be constructed, if and when authorized, by the Bureau of Reclamation.

C. If the plan as now authorized were to be modified as proposed by the report of the Board of Rivers and Harbors and completed, there would remain throughout the upper part of the basin, at least, flood-damaged and flood-menaced areas for which no relief would have been authorized.

D. I am in hearty agreement with the proposal that modification of the plans for the reservoirs proposed in the report of the Board of Rivers and Harbors be an expressly reserved privilege. Our studies indicate that the corps may want to adjust its plans for the location and size of some of these reservoirs when the full facts are developed. The Bureau of Reclamation contemplates the recommendation of construction of a number of reservoirs upstream from the main-stem reservoirs that have been included in the report of the Board of Rivers and Harbors. Numbers of these will have flood-control functions, and they may have far-reaching effects on the storage capacity needed on the Missouri River in North Dakota and South Dakota. Full consideration of these matters may considerably alter the reservoirs as initially suggested. For example, through elimination of one of the main-stem reservoirs, if that should be found to be warranted, and the substitution of several reservoirs on tributaries to provide commensurate flood-control storage, it probably would be possible for the Bureau of Reclamation to make marked irrigation contributions that are not contemplated in the report as it was submitted for comment. Also, our studies indicate that diversions of water from the Fort Peck

Reservoirs and the Oahe site for use in North Dakota and South Dakota may be preferable to the proposal in the report that a diversion be made at Garrison Dam. Precisely the same ends would be served, many of them perhaps in higher degree and more profitably for everyone. I should not like to see the door closed now against consideration of any alternate means of replenishing Devils Lake, diverting water into the James and Sheyenne Rivers, and providing for irrigation east of the Missouri River.

Thank you for providing me this opportunity to review the report and to make comments upon it. I hope these views may assist in the completion of the best plan that it is possible now to devise, and in the integration of our work into a truly comprehensive plan for the Missouri River Basin as a whole.

Sincerely yours,

H. W. BASHORE, *Commissioner.*

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, August 28, 1943.

Mr. H. W. BASHORE,
Commissioner, Bureau of Reclamation,
Washington, D. C.

DEAR MR. BASHORE: In accordance with our agreement with reference to multiple-purpose projects, I am enclosing herewith a folder containing copies of the reports of the division engineer and of the Board of Engineers for Rivers and Harbors on the Department's authorized survey on Missouri River, Sioux City, Iowa, to the mouth, with the request that you furnish me with your comment thereon as soon as practicable.

Very truly yours,

E. REYBOLD,
Major General, Chief of Engineers.

* * *

REPORT OF THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS

WAR DEPARTMENT,
THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS,
Washington, August 23, 1943.

Subject: Missouri River, mouth to Sioux City, Iowa.

To: The Chief of Engineers, United States Army.

1. This report is in response to the following resolution adopted May 13, 1943:

> *Resolved, by the Committee on Flood Control, House of Representatives*, That the Board of Engineers for Rivers and Harbors, created under section 3 of the River and Harbor Act approved June 13, 1902, be, and is hereby, requested to review the report on the Missouri River contained in House Document No. 238. Seventy-third Congress, second session, and House Document No. 821, Seventy-sixth Congress, third session, with a view to determining whether any modification should be made therein at this time with respect to flood control along the main stem of the Missouri River from Sioux City, Iowa, to its mouth.

2. The Missouri River has its source in southwestern Montana, flows generally east and south for 2,460 miles through or along seven States, and empties into the Mississippi River 17 miles above St. Louis, Mo. It drains 529,350 square miles consisting largely of plains but including also easterly slopes of the Rocky Mountains and other rugged areas. About 60 percent of the watershed is upstream from Sioux City, Iowa, 760 miles above the river mouth. The principal tributaries below Sioux City are the Platte and Kansas Rivers from the west and the Grand, Osage, and Gasconade Rivers in Missouri. The average annual precipitation ranges from 26 inches at

Sioux City to 40 inches at the river mouth. The soils are very fertile and agriculture is the predominant land use. Sioux City, the Kansas Citys, at mile 377, and the intervening cities of Omaha, Nebr., and Council Bluffs, Iowa, on opposite sides of the Missouri River at mile 632, contain many major industries and important railroad facilities. During drought periods the regions in the vicinity of Devils Lake and James River in the Dakotas become so short of water that the entire population both human and animal is subject to great hardships. The problem of a possible diversion of water from the upper Missouri River to those areas has been under consideration for a long period.

3. Congress has authorized improvement of the Missouri River for navigation to secure a minimum low water depth of 6 feet between the mouth and Sioux City by means of bank revetment, construction of permeable dikes to contract the low water channel and stabilize the waterway, and by dredging. Although this work has not been completed, commercial use is made of the river and the construction accomplished has removed the threat of bank erosion and the occurrence of cut-offs which were formerly very destructive of bordering properties and crops. Primarily to improve the low water flows for navigation, the United States has constructed Fort Peck Reservoir, with storage capacity of 19,500,000 acre-feet, on the Missouri River in Montana. Recently a power plant with 35,000 kilowatt capacity to generate power for irrigation pumpage and other purposes has been placed in operation at Fort Peck Dam. By storing flood waters this reservoir also produces large flood-control benefits.

4. Two types of severe general floods, known as March and June floods from the months in which they usually occur, are characteristic of the Missouri River. The March floods result from melting snow in the plains area above Sioux City and the break-up of river ice. These floods are usually accompanied by only a small amount of

precipitation. June floods result from snow thaws in the headwater mountains accompanied by heavier rainfall. In addition flash floods of local origin cause heavy damages nearly every year. Severe floods between Sioux City and the mouth occurred in 1844, 1881, 1903, 1908, 1909, 1915, 1927, 1935, 1942, and 1943. Flood flows from the Missouri River contribute substantially to flood stages and damages along the Mississippi River. Between Sioux City and the mouth of the Missouri about 1,800,000 acres of land, largely cultivated and highly productive, are subject to inundation at extreme river states. Important areas in Sioux City, Omaha, Council Bluffs, and the Kansas Citys, and parts or all of over 50 smaller municipalities, are included in the flood plain. In March, May, and June of 1943 very severe floods occurred which overtopped or caused failure of nearly all the levees on the Missouri River below Sioux City. The division engineer estimates the damages of these three floods along the main stem below Sioux City at $35,000,000. Under general provisions of the Flood Control Act of 1941 and the act for emergency flood control work approved July 12, 1943, the Department spent $800,000 for rescue and emergency work and is now assisting local interests in restoring their levees to afford the original degree of protection which is estimated to cost $1,800,000.

5. Improvements constructed by local interests to secure relief from floods along the Missouri River between Sioux City and the mouth consist of levees and drainage works at many localities. These improvements, which are reported to have cost $20,000,000, generally afford only minor protection to the areas included. By the Flood Control Act approved June 22, 1936, Congress authorized the construction of levees and walls to afford protection from floods at the Kansas Citys in accordance with plans approved by the Chief of Engineers on recommendation of the Board of Engineers for Rivers and Harbors and as amended by further surveys and studies. This work has been partially completed. In a survey report of June 27,

1942, submitted to the Chief of Engineers, the division engineer recommends modification of the plan to include a cut-off near the Kansas Citys and various changes in the protective works. He estimates the total cost of the works under his modified plan at $15,200,000. The Flood Control Act of August 18, 1941, authorized bank erosion prevention works in the vicinity of Sioux City and levees for protection between Sioux City and Kansas City and authorized $1,000,000 for initiation of construction. These levees would afford protection from a flood similar to that of 1938. No construction has yet been undertaken. By the Flood Control Act of June 28, 1938, Congress approved a general comprehensive plan for flood control and other purposes in the Missouri River Basin and, for its initiation and partial accomplishment, authorized $9,000,000 for reservoirs to be selected and approved by the Chief of Engineers. The Flood Control Act of August 18, 1941, authorized the appropriation of $7,000,000 additional for prosecution of the plan, including the Harlan County Reservoir on Republican River and such other supplemental flood control works on the Republican River as the Secretary of War and Chief of Engineers may find advisable. Construction of reservoirs under this plan has not been commenced except for Kanapolis Reservoir in the Kansas River Basin. Work on this partially completed reservoir has been deferred to conserve critical materials and labor during the war. A plan for reservoir storage of flood waters on Cherry Creek, Colo., an extreme headwater of Platte River, now estimated to cost $11,000,000, was also approved by the Flood Control Act of 1941 and $3,000,000 authorized for partial accomplishment. The estimated total cost of the reservoirs and the protection works for the Kansas Citys is $171,000,000.

6. Local interests desire the undertaking of such works as may be found appropriate for securing relief from floods for the farm lands, cities, and smaller urban communities along the Missouri River between Sioux City and the mouth. In view of the magnitude of the problem

and the number of separate interests involved, they believe that this should be accomplished as a Federal project. Had the levees authorized by the act of 1941 for the section between Sioux City and Kansas City been constructed, they would not have afforded protection during the flood period of the current year. In view thereof, local interests urge a reconsideration of flood protection measures for the entire 760 miles of river and the formulation and execution of a coordinated comprehensive plan of adequate works.

7. The division engineer finds that a proper solution of the flood problems along the main stem of the Missouri River requires the formulation of a comprehensive plan for works to supplement those heretofore approved. He presents such a plan which provides for the construction of 12 additional multiple-purpose reservoirs, 5 on the Missouri River with dams located above Sioux City between Yankton, S. Dak., and Garrison, N. Dak., 2 in the Yellowstone River Basin, and 5 on tributaries of the Republican River; such works as required to convey a feasible amount of water from the proposed Garrison Reservoir on the upper Missouri River across the Divide to the Devils Lake area and to the headwaters of James River; and levees along both banks of the Missouri River between Sioux City and the mouth to protect all areas practicable, with flood walls as necessary in congested areas including pumping plants and drainage outlets. With the reservoirs the levees are planned to afford protection against floods equal to the largest of record. The division engineer estimates the Federal cost at $410,000,000 for reservoirs and related works and $71,600,000 for levees and their appurtenances; and the cost to local interests at $8,400,000 for levee rights-of-way and relocations; making a total cost of $490,000,000. By these proposed improvements, not only would large flood damages be prevented along the Missouri River and its tributaries and the Mississippi River, but also floodwaters would be retained for their best uses for all purposes including

irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation. Considering the large benefits of tangible nature and such intangibles as the saving of human lives, the alleviation of suffering, stabilization of the economic life of the valley, and encouragement of industrial and civic developments, the division engineer concludes that the plan is thoroughly justified. He proposes it as a progressive improvement to be undertaken by steps as conditions warrant and the availability of funds permits.

8. The division engineer recommends: (*a*) That the general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the act of June 28, 1938, as modified by subsequent acts, be expanded to include the plans presented herein and as expanded be approved for prosecution by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers with such modifications thereof and changes therein as in the discretion of the Secretary of War and the Chief of Engineers may become advisable; (*b*) that all reservoirs constructed under the approved plan shall be constructed, operated, and maintained by the War Department under the direction of the Secretary of War and the supervision of the Chief of Engineers; (*c*) that no money appropriated for the prosecution of the works herein recommended shall be expended on the construction of any levee until States, levee districts, or local interests have furnished without cost to the United States all lands, easements, and rights-of-way for levees and have agreed that they will maintain the levees after their completion; (*d*) that in addition to previous authorization for the Missouri River Basin there be authorized to be appropriated a sum adequate to provide for the initiation and prosecution of the expanded general comprehensive plan in a logical step-by-step manner.

VIEWS AND RECOMMENDATIONS OF THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS

9. Flood control and the conservation of water resources are urgently needed in the Missouri River Basin. The water that now produces floods should be stored and put to beneficial use in the interest of navigation, power development, irrigation, and other useful purposes. To accomplish this, the division engineer has presented a comprehensive plan for improvement which in the opinion of the Board is sound and adequate. Such an extensive program would necessarily be carried out step by step with the details formulated progressively in cooperation with other Federal agencies and local interests so as to take into account future trends in precipitation and agricultural and industrial developments.

10. The division engineer has largely confined his discussion of benefits of the plan to the Missouri River Basin, which embraces approximately one-sixth of the total area of the United States. During the current year, floods along the main stem of the Missouri River caused an estimated damage of $35,000,000 for the section below Sioux City alone, or an amount nearly one-half as large as the estimated cost of the proposed levees. Considerably higher stages have been experienced in the past whose recurrence under present conditions would cause damages many times greater than those caused by the 1943 flood. Recurrence of these and the occurrence of still larger floods are to be anticipated unless preventive measures are undertaken. From this the Board concludes that the flood problem is a serious one and that large expenditures to remedy it are justified. The Board concurs with the division engineer that by retention for the various uses enumerated, the surplus waters which cause these floods can be made to return very large benefits. The plan presented to serve these multiple purposes would provide the flood-plain lands included below Sioux City with complete protection from all floods of past magnitude.

11. In addition the plan would effect important reductions in flood stages along the Mississippi River below the mouth of the Missouri.

Thus, the proposed Missouri River Basin reservoirs, operated in coordination with the authorized reservoirs in the Ohio, Arkansas, and other basins would become an important and beneficial part of the flood-control system of the lower Mississippi River. Use of the stored water for multiple purposes would also improve low-water flows in the Mississippi River thereby saving considerable dredging costs for the 9-foot navigation channel. Improvement of the low water flow would assist in providing a 12-foot depth in the Mississippi River, study of which has been requested by the Committee on Rivers and Harbors of the House of Representatives.

12. Because of the many interests involved and uncertainty as to the manner in which this important section of the United States may develop in the future, the Board considers it impracticable at this time to make a detailed monetary estimate of the benefits which will accrue from the comprehensive plan. Considering the potentialities of the Missouri River Basin, the Board expects a continued expansion of its economic activities and considers the proposed plan as an advisable aid in that connection. It is certain that the benefits from the work will be very great and widespread. After thorough consideration the Board concludes that the United States will profit by undertaking the improvements as recommended by the division engineer on a step-by-step basis.

13. Accordingly, the Board recommends modification of the approved general comprehensive plan for flood control and other purposes in the Missouri River Basin to include 12 additional multiple-purpose reservoirs, works to divert water to the Devils Lake and James River Basin regions, and a system of levees and similar improvements along the Missouri River between Sioux City and the mouth, in general accordance with the plan

of the division engineer as shown on the accompanying map with such modifications thereof and changes therein as the Secretary of War and Chief of Engineers may find advisable, at an estimated cost to the United States of $481,600,000 for these additional works, the improvements to be constructed and, except for the levees and appurtenances, operated and maintained by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers; subject to the condition that no expenditures shall be made for the construction of any levee unit and appurtenant works recommended herein until local interests (*a*) provide without cost to the United States, all land, easements, and rights-of-way necessary for construction of said levee unit and appurtenant works; and (*b*) agree to hold and save the United States free from damages due to the construction of the levees and appurtenant works; and (*c*) agree to maintain and operate the levees and appurtenant works after completion, such maintenance to include cutting grass, removal of weeds, local drainage, and minor repairs. The Board further recommends that in addition to previous authorizations of funds there be authorized for appropriation, funds sufficient to provide for initiation and prosecution of the expanded general comprehensive plan in logical steps.

For the Board:

JOHN J. KINGMAN,
Brigadier General, United States Army,
Senior Member.

REVIEW OF REPORTS ON THE MISSOURI RIVER BASIN

SYLLABUS

Approximately 1,800,000 acres of land along the Missouri River between Sioux City and the mouth are subject to destructive floods. This area is predominately agricultural; however, portions of Sioux City, Iowa;

Council Bluffs, Iowa; Omaha, Nebr.; the Kansas Citys in Kansas and Missouri, and many smaller municipalities are also subject to flooding in some degree.

Several major floods have occurred during the past 100 years. These include the floods of 1844, 1881, 1903, and three severe floods so far during 1943. The damages caused so far during 1943 are estimated to be about $35,000,000.

Between Sioux City and the mouth, the river is being improved for navigation. Prior to the construction of river-improvement works, the river meandered from bluff to bluff, and caused serious damage to farm property by bank erosion and channel cut-offs. The river-improvement works have now stabilized the banks and provided a fixed channel in the flood plain, thus eliminating the previous hazards due to bank erosion and cut-offs. However, the flood hazard remains.

In an attempt to provide flood protection for their lands, local interests have constructed levees and drainage works throughout the reach from Sioux City to the mouth. It is estimated that the total amount expended on these works to date is in excess of $20,000,000. However, the levees are generally inadequate to protect against any except the minor floods, and have not been constructed in accordance with any unified, correlated plan.

Local interests are anxious to secure a much greater degree of protection than they now have, but consider that the problem is of such magnitude that the burden must be assumed by the Federal Government. There is no question but that the additional flood protection is needed and justified. Although a considerable increase in the amount of protection now afforded can be provided by levees, it is impracticable to provide complete protection against all past floods by levees alone. However, complete protection against all past floods can and should

be provided by a system of levees supplemented by reservoirs.

The plan proposed herein would provide for a series of levees and appurtenant works along both sides of the Missouri River from Sioux City to the mouth, supplemented by the presently authorized reservoirs in Nebraska, Kansas, and Missouri, and additional multiple-purpose reservoirs. The estimated cost of the levee project is $80,000,000 and of the additional multiple-purpose reservoirs is $410,000,000.

It is recommended that the general comprehensive plan for flood control and other purposes in the Missouri River Basin be expanded to include the plan as proposed in this report.

WAR DEPARTMENT,
OFFICE OF THE DIVISION ENGINEER,
MISSOURI RIVER DIVISION,
Omaha, Neb., August 10, 1943.

Subject: Report on review of the reports on the Missouri River Basin.

To: The Chief of Engineers, United States Army, Washington, D.C.

I. INTRODUCTION AND GENERAL DESCRIPTION

1. *Authority for report.*—This report is submitted in compliance with the following resolution of the Committee on Flood Control, House of Representatives, adopted May 13, 1943.

That the Board of Engineers for Rivers and Harbors, created under section 3 of the River and Harbor Act approved June 13, 1902, be and is hereby requested to review the reports on the Missouri River contained in House Document No. 238, Seventy-third Congress, second session, and House Document 821, Seventy-sixth Con-

gress, third session, with a view to determining whether any modification should be made therein at this time with respect to flood control along the main stem of the Missouri River from Sioux City, Iowa, to its mouth.

2. *Arrangement of report.*—The report contains the following parts:

MAIN BODY OF REPORT

I. Introduction and general description.

II. Flood characteristics.

III. Flood problem.

IV. Proposed flood-control plan.

V. Economic justification and discussion.

VI. Conclusions.

VII. Recommendations.

APPENDIXES

I. Maps and charts.[1]

II. Transcript of public hearings.[2]

3. *Scope of report.*—In the preparation of this report, the "308" report on the Missouri River, House Document 238, Seventy-third Congress, and the report on the Missouri River from Sioux City, Iowa, to Kansas City, Mo., House Document 821, Seventy-sixth Congress, were reviewed. In addition, the following were also utilized: Other reports prepared by this Department, reports of other agencies, flood-damage investigations, hydrographic surveys, studies of aerial photographs of the alluvial valley, special field investigations and compilation of known survey data and other information available in the Department.

---

[1] Only pl. 16 as printed.

[2] Not printed.

4. Public hearings to determine the views and suggestions of local interests were held at Washington, Mo., on June 8, 1943; at Onawa, Iowa, on June 9, 1943; at Nebraska City, Nebr., on June 10, 1943. Data for this report were prepared by the Kansas City and Omaha districts and correlated by the Missouri River division.

5. *General description of the basin.*—The Missouri River is formed by the confluence of the Gallatin, Madison, and Jefferson Rivers at Three Forks, Mont., and flows generally east and south about 2,460 miles to its confluence with the Mississippi River about 17 miles above St. Louis. The drainage area of the basin is 529,350 square miles, including 9,715 square miles in the Dominion of Canada. That portion of the drainage area located within the United States includes all of the State of Nebraska and portions of the States of Montana, Wyoming, North Dakota, South Dakota, Minnesota, Colorado, Iowa, Kansas, and Missouri.

6. Most of the area within the Missouri River Basin is gently rolling or plains country. The Ozark Mountains in Missouri, the Black Hills in South Dakota, and the Rocky Mountains which form the western boundary of the basin are the principal mountainous areas in the basin. In the reaches of the Missouri River above Fort Benton, the river generally flows through narrow valleys and canyons with banks composed of rock and gravel. Between Fort Benton and Sioux City, Iowa, the Missouri River flows through a valley from 1 to 10 miles in width, with easily eroded banks and an unstable channel.

7. *General description of basin below Sioux City.*—The drainage area of the Missouri River above Sioux City is 314,617 square miles, and below Sioux City it is 214,733 square miles. Between Sioux City, Iowa, and the mouth, the principal tributaries are the Platte and Kansas Rivers, whose principal drainage areas are, respectively, in Nebraska and Kansas, and the Grand,

Osage, and Gasconade Rivers, whose principal drainage areas are in Missouri.

8. Below Sioux City the bluffs along the valley are steeply rolling to nearly vertical and rise from 150 to 300 feet above the valley floor. The valley width varies from 1½ to 17 miles. The average width of the valley is about 5 miles. The valley-floor elevations vary from approximately 420 feet mean sea level at the mouth to approximately 1,100 feet mean sea level at Sioux City.

9. The average rainfall for the area between Sioux City, Iowa, and the mouth varies from about 26 inches at Sioux City to about 40 inches near the mouth. The regimen of the Missouri River is characterized by wide variations between maximum and minimum discharges. In the reach of the river between Sioux City, Iowa, and the mouth, records of river stages are available since 1872. However, except for the period 1870 to 1891, discharge measurements have been obtained at stations along this reach of the river only since about 1928.

10. The area along the Missouri River between Sioux City, Iowa, and the mouth is predominately agricultural. Dairying and truck gardening are carried on extensively near the large municipalities. In the larger municipalities there is considerable industrial development. The area has well-developed railroad and highway facilities. There is an existing 6-foot navigation project from Sioux City, Iowa, to the mouth. Commercial navigation has been carried on below Kansas City, Mo., for many years and to Omaha, Nebr., for several years prior to the war. Several commercial towboats formerly operating on the Missouri River have recently been withdrawn for use on the Mississippi and other inland waterways to assist in relieving the critical transportation problems in the East. However, when towing equipment is available waterborne transportation will be available to the entire area under investigation.

11. *Pertinent existing and authorized Federal projects.*—The existing navigation project between Sioux City, Iowa, and the mouth resulted from authorization contained in acts of Congress dated July 25, 1912; August 8, 1917; March 3, 1925; and January 21, 1927. The existing project provides for securing a navigable channel with a minimum low-water depth of 6 feet, by means of bank revetment, permeable dikes to contract and stabilize the waterway, removal of snags, and occasional dredging. The project is about 97 percent complete between Kansas City, Mo., and the mouth, and about 90 percent complete between Sioux City, Iowa, and Kansas City, Mo. Further new construction has been deferred in order to conserve critical materials and manpower for the war effort. The navigation works, although not completed, have already stabilized the banks of the river, eliminated the constant shifting of the channel, and greatly reduced bank erosion.

12. The Fort Peck Dam in Montana was authorized by the River and Harbor Act of August 30, 1935. The Fort Peck Dam, with a gross reservoir capacity of about 19,500,000 acre-feet, was constructed primarily for assuring adequate navigation depths downstream. The dam was essentially completed in 1939. The reservoir is operated to store excess water during the high-water season for later release to augment the flow during low-water periods. A hydroelectric power plant at the Fort Peck Dam was authorized by the act of Congress of May 18, 1938. On June 30, 1943, one 35,000 kilowatt unit was placed in operation. Operation of the project not only provides water for navigation and the generation of power for irrigation and other purposes, but produces large flood-control benefits by storing excess flows during high-water periods.

13. Under the Flood Control Act of June 28, 1938, the general comprehensive plan for flood control and other purposes in the Missouri River Basin as set forth in

Flood Control Committee Document No. 1, Seventy-fifth Congress, first session, was approved, and $9,000,000 authorized for reservoirs for the initiation and partial accomplishment of the plan. Construction work has been started on one reservoir project only, the Kanopolis Dam on the Smoky Hill River in central Kansas, at an estimated total cost of $9,000,000. Completion of the construction work on this dam has been deferred in order to conserve critical materials and manpower.

14. Under the Flood Control Act of August 18, 1941, there was authorized to be appropriated in addition to previous authorizations, $7,000,000 for the prosecution of the comprehensive plan approved in the act of June 28, 1938, including the Harlan County Reservoir on the Republican River in Nebraska and such other supplemental work on the Republican River as the Secretary of War and the Chief of Engineers may find advisable. The plan presented in this report provides for necessary and desirable dams on tributaries of the Republican River as well as the Harlan County Dam on the main stem of that river as authorized in the Flood Control Act of 1941.

15. A system of levees along the Missouri River between Sioux City, Iowa, and Kansas City, Mo., and a bank-erosion project just above Sioux City were authorized by the Flood Control Act of 1941, substantially in accordance with the plans presented in House Document 821, Seventy-sixth Congress, third session. The plan included in House Document 821 would provide protection against discharges similar to those which occurred during the 1938 flood.

16. A project for protection of the Kansas Citys of Kansas and Missouri was authorized for construction in the Flood Control Act of 1936, "in accordance with plans approved by the Chief of Engineers on recommendation of the Board of Engineers for Rivers and Harbors and as amended by further surveys and studies now in progress * * *." Construction of some of the units of this project

was started but has since been deferred in order to conserve critical materials and manpower for the war effort. Further studies have been made and a survey report dated June 27, 1942, has been submitted to the Chief of Engineers. The report of June 27, 1942, proposes modification of the plan used as a basis for the authorization in the Flood Control Act of 1936 to include a cut-off at Liberty Bend, near the Kansas Citys, and various changes in alinement and height of the protective works. The plans presented in the report of June 27, 1942, were discussed at the hearings of the Flood Control Committee in June 1943.

II. FLOOD CHARACTERISTICS

17. *General.*—The Missouri River between Sioux City, Iowa, and the mouth is subject to two general periods of high water each year. The first is often referred to as the March rise. It is caused by the rapid melting of snow in the Plains areas in Montana, Wyoming, and the Dakotas and the break-up and melting of the ice in the main stem and its tributaries. This melting of snow and ice occurs in a relatively short period of time and turns into flowing water the moisture that has been held back throughout the winter months in the form of snow and ice. This high-water period is usually accompanied by a relatively small amount of precipitation. It is characterized by relatively sharp peaks, although the volume of water during this high-water period is considerable. Due to the fact that this rise is ordinarily accompanied by very little precipitation, the crest flattens as it continues downstream, and floods from this rise are usually most severe in the upper part of the river. An example of a March rise flood is the one that occurred during the spring of 1943. This rise produced stages higher than any since the 1881 flood from Pierre, S. Dak., to Rulo, Nebr.

18. The second general period of high water is often referred to as the June rise. This high-water period oc-

curs subsequent to the March rise and is produced by the combined run-off from two sources: (1) the melting of snow from the mountains in the headwaters regions, which persists for a comparatively long period of time (2 or 3 months), and (2) run-off from rainfall occurring in the basin. Floods from this rise are ordinarily most severe in the lower part of the basin where the rainfall is normally the greatest. The run-off from excessive snow melt from the headwaters regions, combined with run-off from heavy rainfall in the basin, produces floods of major proportions. Examples of this type of flood are those which occurred in 1844 and 1903.

19. The Missouri River Valley is also subject to flash floods which occur at various times during the year. Many of these flash floods reach major proportions for considerable distances along the river and usually occur as a result of heavy run-off from local tributaries or from local ice jams. Practically every year there is some flooding along the Missouri River from Sioux City to the mouth as a result of flash floods.

III. FLOOD PROBLEM

20. *Agricultural areas subject to floods.*—Between Sioux City, Iowa, and the mouth there are about 1,800,000 acres of land subject to flooding at extreme stages. Most of this area is under cultivation at the present time and includes some of the most fertile and productive land in the world. The principal crops grown are corn, wheat, barley, rye, oats, alfalfa, and garden produce. Although the land is highly productive, floods on the Missouri River have always constituted a serious hazard to farming. Previous to the construction of river improvement works, the land was not only subject to floods but to damage by bank erosion and cut-offs. The threat from bank erosion and cut-offs has now been removed by the river stabilization works, but the flood hazard still remains.

21. *Municipal areas subject to floods.*—The principal cities subject to flooding are the Kansas Citys in Kansas and Missouri; Council Bluffs, Iowa; Omaha, Nebr.; and Sioux City, Iowa.

(*a*) The Kansas Citys, with a total population of over a half million people, include in the bottom lands subject to floods the stockyards which are the second largest in the world, many manufacturing and industrial establishments, important rail lines and highways, two airports, and the entire municipality of North Kansas City, Mo.

(*b*) At Council Bluffs, Iowa, a city of of more than 40,000 population, over half the city would be inundated in a major flood, including important railroads, manufacturing and industrial establishments.

(*c*) At Omaha, Nebr., a city of over 200,000 population, the municipal airport is located within the flood plain, also important manufacturing and industrial plants, and the entire village of Carter Lake, Iowa, which includes about 1,250 families.

(*d*) At Sioux City, Iowa, a city of over 80,000 population, a portion of the business district is subject to flooding, and also a large part of the stockyards, railroad facilities, and some manufacturing and industrial establishments.

In addition to these cities, there are over 50 smaller municipalities which are wholly or partially vulnerable to floods along the main stem of the Missouri River.

22. *Floods.*—In the upper part of the river the highest flood of record was caused by the March rise of 1881. Practically the entire area from bluff to bluff was inundated from Sioux City, Iowa, to St. Joseph, Mo., and the river was above flood stage all the way to the mouth. In addition to the damage caused by the water itself, there was a great deal of damage done by the cutting and crushing action of huge cakes of ice as they were swept down-

stream. When reservoirs are constructed upstream from Sioux City, this type of damage will be largely eliminated. The flood of 1881 caused millions of dollars of damage.

23. In the lower part of the river the highest flood of record was caused by the June rise of 1844. This flood also produced stages in the upper part of the river approaching those of the 1881 flood. Reliable records of the damage caused by this flood are not available. The next highest flood of record in the lower part of the river was caused by the June rise of 1903. This flood paralyzed commerce, industry, and communications for weeks and caused millions of dollars of damage at the Kansas Citys alone. It flooded the entire bottoms area on which is now located hundreds of industrial and manufacturing plants and the airports. The total direct damage during this flood between Sioux City and the mouth was over $10,000,000.

24. In addition to the floods of 1844, 1881, and 1903, there have been many other severe floods between Sioux City and the mouth, such as those which occurred during 1908, 1909, 1915, 1927, 1935, 1942, and 1943. In fact, there is flooding of some consequence practically every year on the Missouri River between Sioux City and the mouth.

25. Individual farmers, groups of farmers, levee districts, and drainage districts have constructed levees at many locations between Sioux City and the mouth in an attempt to safeguard their lands and property. Accurate figures are not available as to the total amount expended by local interests on levees and drainage works in their efforts to provide flood protection, but it is estimated that these expenditures have exceeded $20,000,000. The levees have been successful in protecting against some of the minor floods, but have not been adequate to withstand the more severe floods.

26. The March rise of 1943 produced a major flood in the upper part of the river under investigation. The resulting stages were higher than any experienced since 1881. Levees were breached all the way from Sioux City to Kansas City. Then in May, as a result of heavy rainfall, a major flood occurred in the lower part of the river. Stages below the mouth of the Osage River were, in general, higher than those of the 1903 flood. This flood breached or overtopped most of the levees between Jefferson City, Mo., and the mouth. Following this flood and as a result of additional heavy rainfall, another severe flood occurred in June which extended all the way from Nebraska City to the mouth, with stages from Waverly, Mo., to Glasgow, Mo., approximating those of the 1903 flood. This flood caused the breaching or overtopping of practically all of the levees between Kansas City and Jefferson City which had not previously failed.

27. The floods of 1943 have caused damages so far of about $35,000,000 along the main stem of the Missouri River between Sioux City and the mouth. About 1,000,000 acres of land have been inundated, of which about 200,000 acres were flooded for the second time. On about 600,000 acres the flooding prevented the production of the normal crop, and on about 300,000 acres it may require from 1 to 3 years before the land can be placed into full normal crop production. Highways and railroads in the river valley suffered heavily. Practically every agricultural levee between Sioux City and the mouth was either overtopped, breached, or otherwise seriously damaged. Many of these levees had been previously damaged by the high water of 1942, and repaired either by the local interests or by the Federal Government under the provisions of section 5 of the 1941 Flood Control Act. The amount expended under provisions of section 5 of the 1941 Flood Control Act amounted to approximately $300,000. All this effort and expense was nullified by the 1943 floods. In addition, the Engineer Department ex-

pended over $800,000 for rescue and emergency work during the 1943 floods.

28. Under the provisions of section 5 of the 1941 Flood Control Act and Public Law 138, Seventy-eighth Congress, approved July 12, 1943, the Department is now assisting local interests in the restoration of their damaged levees. The estimated cost of restoring the levees damaged during the 1943 floods to their original degree of protection is approximately $1,800,000.

29. *Desires of local interests.*—For years the desire for adequate flood protection has been voiced by local interests in their contacts with the Engineer Department. In 1939, following an organized effort on the part of local interests between Sioux City and Kansas City, an investigation was authorized by resolution of the Committee on Commerce, United States Senate, to determine whether any modification should be made in the report on the Missouri River contained in House Document 238, Seventy-third Congress, second session, with respect to flood control along the main stem of the Missouri River from Sioux City, Iowa, to Kansas City, Mo. As a result of this investigation, Congress authorized a system of levees between Sioux City and Kansas City which would provide protection against a flood similar to that of 1938. However, no money was ever appropriated to construct works authorized under this authorization.

30. Discouraged by the apparent futility of restoring and repairing existing private levees, only to have them breached or overtopped time and again, and realizing that the 1943 floods would have breached or overtopped the levees authorized in the 1941 act had they been constructed, local interests have asked for a restudy of the problem. This resulted in the congressional resolution authorizing the present report.

31. Local interests are definitely of the opinion that more adequate protection than is provided by existing

works is necessary. They also are convinced this must be accomplished through some unified and well-coordinated plan, and that the problem is of such magnitude that the burden must be assumed by the Federal Government. This general attitude is reflected in the discussions in the public hearings held in connection with this report (see appendix II),[2] by numerous resolutions adopted by local organizations and by the many recent contracts with local interests in connection with repair of levees under provisions of section 5 of the 1941 Flood Control Act.

IV. PROPOSED FLOOD CONTROL PLAN

32. The plan of flood control proposed herein consists of a series of levees and appurtenant works along both sides of the river from Sioux City, Iowa, to the mouth of the Missouri River, supplemented by the presently authorized reservoirs in Nebraska, Kansas, and Missouri, and additional multiple-purpose reservoirs, including reservoirs above Sioux City. This plan would provide flood protection for agricultural lands along both sides of the river and protection for the cities of Sioux City, Iowa; Council Bluffs, Iowa; Omaha, Nebr.; and the Kansas Citys, Kans. and Mo. A plan for the protection of the Kansas Citys is described in a survey report prepared by the district engineer, Kansas City, dated June 27, 1942, and no change in that plan is proposed herein. The general alignment of the proposed levees is shown on sheets 1 to 9 and the proposed profile of the design flood is shown on sheets 10 to 15, appendix I.[1]

33. In determining the degree of protection which should be provided by the levees, the following factors were considered:

(*a*) The effect on future flood discharges of the operation of the system of authorized reservoirs in the lower part of the basin.

---

[1] Only pl. 16 is printed.

[2] Not printed.

(*b*) The effect on future flood discharges of the operation of multiple-purpose reservoirs upstream from Sioux City.

(*c*) The height to which it is practicable to construct earth levees along the Missouri River without danger of destruction by foundation failure or by development of sand boils.

(*d*) The amount of set-back of the levees which would be required to provide adequate floodway capacity.

34. Flood discharges are usually greatest in the lower part of the river, which area normally receives the greatest amount of rainfall. Also the valley in the lower end is considerably narrower than in the upper part. Consequently, the relative degree of protection which can be economically provided by levees alone is considerably less in the lower part of the river than in the upper river. This emphasizes the need for completion of the reservoirs now authorized for the lower part of the river.

35. Complete protection against all floods of record by levees alone is impracticable. However, the levees proposed herein, supplemented by the presently authorized reservoirs in the lower part of the basin and the additional multiple-purpose reservoirs would provide protection between Sioux City, Iowa, and the mouth against all past floods of record.

36. The proposed levees for protecting agricultural areas would be of earth fill, with a 10-foot crown width, and side slopes of 1 on 3 on the river side and 1 on 5 on the land side, with a 2-foot freeboard above the design flood after settlement. Drainage structures would be placed through the levees as required to drain interior run-off. Where required, by foundation conditions or other special reasons, rolled fill levees would be constructed. Proposed floodway widths between levees would vary from a minimum of 3,000 feet from Sioux City,

Iowa, to Kansas City, Mo., and 5,000 feet from Kansas City, Mo., to the mouth.

37. At places where there is a concentration of population and property values, such as at Sioux City, Iowa; Omaha, Nebr.; Council Bluffs, Iowa; and Gasconade Boatyard in Missouri, the levees would be rolled fill with 10-foot crown width and side slopes of 1 on 3 on the river side and 1 on 4 on the land side, with a 3-foot freeboard above the design flood. Where space is not available for levees, concrete flood walls would be constructed. Drainage structures would be provided through the levees and where necessary pumping plants would be provided to care for drainage during flood periods. Floodway widths at municipal and special areas would be determined by economic considerations.

38. The plan for control of bank erosion above Sioux City, Iowa, presented in House Document 821, Seventy-sixth Congress, third session, was reconsidered; however, no change in that previously recommended is considered necessary at this time. The plan for the protection of the Kansas Citys as contained in the report referred to in paragraph 32 was also reviewed and no change in the plans proposed therein is considered necessary.

39. *Levee costs.*—The estimated cost of the levees and appurtenant works as proposed herein is as follows: [3]

[Table Omitted in Printing]

40. The design flood profile and location of the proposed levees as submitted with this report are sufficiently accurate for the purpose of estimating costs; however, before construction is initiated, final design flood profiles and the exact locations of the levees should be correlated with the latest data available on the comprehensive plan of development.

---

[3] Exclusive of the costs for protection at the Kansas Citys, which costs are shown in table 2, par. 48.

41. Although protection against all past floods of record cannot be accomplished by levees alone, complete protection can and should be provided by completing the reservoirs authorized in the lower part of the basin and by constructing additional reservoirs including reservoirs above Sioux City. In order to provide for the maximum utilization of the waters of the basin, the reservoirs proposed above Sioux City should be multiple-purpose projects. Studies of multiple-purpose projects above Sioux City show that the following should be included as a part of the comprehensive plan of development for the Missouri River Basin:

[Table Omitted in Printing]

42. In connection with the proposed Garrison Reservoir, a practical solution to a situation which has long existed in the States of North and South Dakota and which periodically causes much trouble is possible. During excessively dry years the regions in the vicinity of Devils Lake and the James River Basin become so short of water that animals are subjected to great suffering and the people to severe hardship. Droughts almost, if not entirely, destroy animal and plant life in these areas. The best over-all use of the multiple-purpose reservoirs would permit a feasible diversion of water from the Missouri River into the Dakotas for domestic use and other purposes. First there must be conserved and stored in the Missouri Basin enough water to provide this diversion. The plan proposed herein provides for such storage in the reservoirs listed in the preceding paragraph. By the time that water is available, there should also be completed pumping facilities and conduits needed to provide the Devils Lake and James River regions at least as much water as they now have during seasons of normal rainfall. Later this flow of water can be increased to provide much additional irrigation. The plan herein contemplates that there shall be started improvements to provide a diversion of water from the Missouri River into the Da-

kotas and that this diversion should be progressively increased and improved as time and conditions warrant such improvements. The location of the facilities for the first phase of this improvement is indicated on the map accompanying this report.

V. ECONOMIC JUSTIFICATION AND DISCUSSION

43. The damage caused by the 1943 floods alone on the Missouri River between Sioux City and the mouth is estimated to be about $35,000,000, or almost one-half of the cost of the proposed levee project.

44. The total value of the area subject to floods along the Missouri River between Sioux City and the mouth, including all fixed and movable property, has been estimated to be about $1,000,000,000.

45. The comprehensive plan proposed herein would provide not only complete protection for this area against all past floods on the Missouri River, but would effect important reductions in flood stages on the lower Mississippi River. In addition to providing flood-control benefits on the Missouri and Mississippi Rivers, the comprehensive plan would also provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.

46. Furthermore, the plan would provide many intangible benefits including:

(1) The saving of lives.

(2) The alleviation of human suffering.

(3) A general stabilization of the economic life of the valley and of interstate commerce.

(4) The encouragement of industrial and civil developments.

47. The plan is unquestionably justified.

48. Although the construction of the comprehensive plan is justified and should be ultimately accomplished in its entirety, it is recognized that it would not be feasible to initiate the construction of all of the units at one time. Instead, the development should proceed in an orderly, step-by-step manner as circumstances and availability of funds permit. Units selected for the first phase of development should be those which would provide the greatest benefits from progressive step-by-step construction. This general scheme of progressive development has been successfully carried out on the Nile River and other rivers. On the Nile the Aswan Dam was originally a relatively low structure but has since been raised three times as the needs of the region warranted. Similarly, on the Mississippi River the plan for flood control has been modified several times to provide for an increased degree of flood protection. Table 1 shows projects to be authorized and included in the comprehensive plan. Table 2 shows projects already authorized.

[Table Omitted in Printing]

[Table Omitted in Printing]

49. In connection with the development of the multiple-purpose projects, those shown for the Missouri River will provide for the maximum practicable storage of water of the main stem. The water to be impounded in these, as well as the other multiple-purpose structures shown in tables 1 and 2, will be utilized to produce the maximum practicable development of irrigation, navigation, power, and other multiple purposes. However, sufficient storage will be provided in each reservoir to provide for the needs of local flood protection down-stream from the reservoir as well as for the needs of the general comprehensive plan for flood control for the Missouri River Basin. To provide for the maximum utilization of the waters stored in multiple-purpose reservoirs, a plan would be worked out for each structure in collaboration with the various water-use agencies involved. The amount of water to be made

available to the Bureau of Reclamation for irrigation would be arrived at after close collaboration with that agency. The development of power potentialities would be determined in cooperation with the Federal Power Commission. Water use for other purposes would be arrived at in a similar manner.

VI. CONCLUSIONS

50. It is concluded that the existing approved plan of improvement for the Missouri Basin should be expanded substantially as indicated herein to include in addition to the plan authorized under existing law, the following:

(*a*) A series of levees and appurtenant works along both sides of the Missouri River from the vicinity of Sioux City, Iowa, to the vicinity of the mouth of the Missouri River.

(*b*) The following multiple-purpose reservoirs: Five on the main stem of the Missouri River, five on the tributaries of the upper Republican River, one on the Big Horn River, and one on the Yellowstone River.

(*c*) A diversion from the vicinity of Garrison Dam into the Dakotas extending to the Devils Lake and the James River Basin regions together with the pumping stations, conduits, and other facilities necessary to supply water during drought seasons for the Devils Lake and James River regions.

VII. RECOMMENDATIONS

51. It is recommended:

(*a*) That the general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the act of June 28, 1938, as modified by subsequent acts, be expanded to include the plans presented herein and as expanded be approved for prosecution by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers with

such modifications thereof and changes therein as in the discretion of the Secretary of War and the Chief of Engineers may become advisable.

(*b*) That all reservoirs constructed under the approved plan shall be constructed, operated, and maintained by the War Department under the direction of the Secretary of War and the supervision of the Chief of Engineers.

(*c*) That no money appropriated for the prosecution of the works herein recommended shall be expended on the construction of any levee until States, levee districts, or local interests have furnished without cost to the United States all lands, easements, and rights-of-way for levees and have agreed that they will maintain the levees after their completion; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs.

(*d*) That in addition to previous authorizations for the Missouri River Basin there be authorized to be appropriated a sum adequate to provide for the initiation and prosecution of the expanded general comprehensive plan in a logical step-by-step manner.

LEWIS A. PICK,
Colonel, Corps of Engineers, Division Engineer.

APPENDIX B

78TH CONGRESS
2d Session

SENATE

DOCUMENT
No. 191

MISSOURI RIVER BASIN

CONSERVATION, CONTROL, AND USE OF WATER RESOURCES

OF THE

MISSOURI RIVER BASIN IN MONTANA, WYOMING, COLORADO, NORTH DAKOTA, SOUTH DAKOTA, NEBRASKA, KANSAS, IOWA, AND MISSOURI

(Report by Secretary of the Interior Harold L. Ickes on Bureau of Reclamation's Plan for Basin Development)

APRIL 1944

[LOGO]

PRESENTED BY MR. O'MAHONEY

MAY 5 (legislative day, APRIL 12), 1944.—Ordered to be printed with illustrations

---

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

MISSOURI RIVER BASIN

LETTER FROM THE BUREAU OF THE BUDGET

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D. C., May 4, 1944.

The Honorable the SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: I have your letter of May 1 transmitting a copy of the report entitled "Conservation, Control, and Use of Water Resources of the Missouri River Basin."

I am not now able to advise you, because of the need for further consideration of certain recommendations of the proposed report, as to the relation to the program of the President of the various recommendations therein.

Since I am advised, however, that the congressional committees having jurisdiction of pending legislation, to which these recommendations relate, are contemplating early consideration of such legislation, I am writing to say that this office would, of course, have no objection to your making the report immediately available for the consideration of these committees. In doing so, the committee should be informed, I think, that you have not received from this office advice as to the relation of the report recommendations to the program of the President.

Very truly yours,

HAROLD D. SMITH, *Director.*

LETTER FROM THE DEPARTMENT OF THE INTERIOR

DEPARTMENT OF THE INTERIOR,
Washington, May 1, 1944.

THE PRESIDENT,
The White House.

(Through the Bureau of the Budget.)

MY DEAR MR. PRESIDENT: There is transmitted herewith my report on the Missouri River Basin, which is the letter of April 28, 1944, of the Commissioner of Reclamation and its attachments, which I approve.

The report contemplates utilization of the waters of the Missouri River beneficially for multiple purposes in the stabilization of the agriculture and economy of this vast basin which includes the Northern Great Plains, where drought periodically deals devastation. The maximum degree of stabilization can be obtained only through full utilization of the waters of this river system.

The construction proposed in this report would be complementary, for the most part, to that recently suggested by the Secretary of War for flood control on the Missouri River. The two plans, while not identical, apparently can be successfully coordinated.

The initial stage proposed in this report would involve expenditures estimated at $200,000,000. The economic and human gains that can be expected will amply justify this step. The plan has engineering feasibility. Water users, rural and urban, would be expected to repay, in accordance with their ability and the benefits extended to them, parts of the costs, and I find that they probably can meet the charges indicated. Power users would be expected to repay additional parts of the costs. It reasonably can be expected that these returns to the United States Treasury will be effected. Flood control and navigation allocations would be non-reimbursable. Substantial and material benefits would accrue through recreational use of the waters and facilities proposed; through

their use in fish and wildlife conservation; through pollution abatement, silt control, and the recharge of lakes and ground waters. These are not assessable in monetary terms, and no repayments are contemplated from them.

I find desirable and feasible the development of the Missouri River Basin in accordance with this report on the Conservation, Control, and Use of the Water Resources of the Missouri River Basin, and I recommend authorization for construction after the war of the initial stage in accordance with the report and as contemplated in Section 9 of the Reclamation Project Act of 1939.

Sincerely yours,

HAROLD L. ICKES,
Secretary of the Interior.

LETTER FROM THE BUREAU OF RECLAMATION

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, April 28, 1944.

THE SECRETARY OF THE INTERIOR.

SIR: In accordance with section 9 of the act of August 4, 1939 (53 Stat. 1187, 43 U. S. C. 485), I transmit this report on Conservation, Control, and Use of the Water Resources of the Missouri River Basin.

I recommend it to you for your approval and for submission to the Congress, after submission to the Bureau of the Budget in accordance with section 4 of Executive Order 9384, and to the President in conformity with the 1939 act.

The reclamation plan proposes a total of 90 reservoirs with a combined capacity of 45,700,000 acre feet, most of the reservoirs on tributaries of the Missouri for use in irrigation, flood control, and power development, but two-thirds of the reservoir capacity on the main stream

for use in flood control, aid to navigation, power development, and irrigation.

When fully developed, the plan would provide water for the irrigation of 4,760,400 acres of dry land, and supplemental water for 538,000 acres of land now irrigated but not assured adequate water in years of low run-off. Seventeen power plants, in the completed power system, would supply seasonal power for pumping water for irrigation, and nearly four billion kilowatt-hours of firm power, annually, for domestic, commercial, and industrial uses.

The irrigation of numerous areas scattered widely over the Northern Great Plains and over other semiarid sections of the Missouri River Basin would add to an unavoidably precarious dry-farm and grazing economy the stabilizing influence of lands with insured crops and high yields.

The droughts of the last decade cost governmental agencies, principally Federal, a total of $1,246,557,087, and these expenditures were inadequate to the needs, since tens of thousands of families nevertheless were forced to migrate from their abandoned homes. These expenditures are roughly equal to the cost of full utilization of the waters of the Missouri River system. While it is not contended that full use of these waters will eliminate drought losses, it will reduce the catastrophic effects and prevent much of the human suffering.

I have submitted the report to the agencies of the Department of the Interior which have interests in the waters of the Missouri River Basin and have their approval or their comment, which is attached. I have submitted the report to the Interagency River Basin Committee, in accordance with the quadripartite agreement of December 29, 1943. I have the comment of the Corps of Engineers, which is also attached.

The Assistant Commissioner of the Office of Indian Affairs, on April 26, 1944, said with regard to the recom-

mendations made in the report dated April 14, 1944 of the Board of Review, that the Office of Indian Affairs should construct, operate and maintain irrigation features including dams that predominantly serve Indian lands. I concur in the opinion, and I am sure that the members of the Board of Review will regret their oversight in this connection. The report should recognize the authority and responsibility of the Office of Indian Affairs in the matter of irrigating Indian lands.

The Chief of Engineers, War Department, in his letter of April 25, 1944 observed that the Reclamation plan included tributary reservoirs that would fit the plan presented by the Corps of Engineers in House Document 475, Seventy-eighth Congress, second session, and commented that modifications made in the proposals for the Yellowstone, Big Horn, Kansas, Smoky Hill, and Republican River Basins could be coordinated in advance of construction by further cooperation by the Corps of Engineers and the Bureau of Reclamation. With regard to the main stem of the Missouri River, however, the Chief of Engineers noted that the reclamation plan contemplated 10,250,000 acre-feet less storage than had been proposed by the Corps, and concluded that a high dam at the Garrison site, which was not included in the reclamation plan, and a dam at Gavins Point, which was omitted from the reclamation plan, are necessary. The main stem dams, the Chief of Engineers said, should be built, operated, and maintained by the corps, and the tributary dams should be built, operated, and maintained by the agency with the dominant interest. Flood control storage should be utilized in accordance with regulations prescribed by the Secretary of War, and irrigation storage in accordance with regulations of the Secretary of the Interior, be proposed. The Chief of Engineers noted that irrigation of the Souris area, as proposed in the Reclamation plan, would require diversion of waters from the Missouri River, and he advised further study of this undertaking pending fulfillment of existing and foresee-

able needs within the Basin. He questioned the computations in the reclamation report of benefits and allocations.

I agree with the Chief of Engineers that details can be worked out satisfactorily through cooperation as the projects are constructed on the tributary streams. I agree that the agency with the dominant interest should construct the dams and other works in the Basin, and I agree that the main stem storage dams should be constructed by the corps, owing to their close relationship with flood control and navigation. The Reclamation plan provides a storage capacity in main stem reservoirs of 24,950,000 acre-feet, which is 10,250,000 acre-feet less than that proposed by the Corps, but when considered together with more than 10,000,000 acre-feet of storage provided upstream, this amount is believed to be sufficient to provide full flood protection and ample storage for regulation for navigation. However, if continuing studies by the Corps and the Bureau of Reclamation should indicate the need of additional storage in the main stem after the high dam at Oahe is built, then there is and should be ample opportunity to provide the additional storage needed. The Oahe Dam, as proposed, would provide a reservoir of a capacity of 19,600,000 acre-feet as against the Garrison Dam proposed by the Corps which would provide a reservoir of only 17,000,000 acre-feet. In any event, one of these would constitute the initial flood-control facility. It would appear that the Oahe Dam would be more desirable from the flood-control standpoint, as it is also from the irrigation point of view.

The regional report of April 1944 is covered by the report of April 14 of the Board of Review. I approve the findings, the comment, and the recommendations made in the report of the Board of Review.

I find that the proposed development of the Missouri River Basin is needed, as conclusively shown in the re-

port. The plan has engineering feasibility. The ultimate cost is estimated at $1,257,645,700, and the annual benefits of the completed development would be 2.57 times the annual costs. The annual benefits would be as follows:

Irrigation	$130,000,000
Power	17,141,000
Flood control	16,500,000
Navigation	4,165,000
Municipal water	500,000

Irrigation would be expected to repay in 40 annual payments $298,000,000. Power revenues in 50 years would repay $423,100,000, and municipal water users would repay $20,000,000.

The initial construction proposed would require $200,000,000 and would be dominantly for irrigation and power. It includes none of the features that would be constructed by the Corps of Engineers in the development of the basin, but it would complement the flood-control construction proposed by the Corps.

I recommend that the construction, repayment, operation, and maintenance of the works proposed be in accordance with this report. I recommend the approval and authorization of the initial stage for construction after the war substantially in accordance with this report, but with such modifications by the Secretary of the Interior and the Commissioner of Reclamation as may be required to meet developing needs.

Respectfully,

H. W. BASHORE, *Commissioner.*

LETTER FROM THE OFFICE OF INDIAN AFFAIRS

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., April 26, 1944.

Mr. HARRY W. BASHORE,
Commissioner, Bureau of Reclamation.

DEAR COMMISSIONER BASHORE: I have examined the confidential copy of the Missouri River report you transmitted on April 20, 1944. This report, in my judgment, is an excellent presentation of the Missouri River Basin problem. I find myself in full agreement with your Bureau's recommendations concerning the priorities of irrigation, domestic and industrial use of the regulated flow of the Missouri River and its tributaries, especially in the upper part of the basin, and I hope that these priorities will be given congressional sanction.

Insofar as the Indian irrigation and power interests are concerned, the report seems to give them adequate consideration. However, I cannot agree with the recommendation of the Board of Review that "all works that may be authorized under the approved plan be constructed, operated, and maintained by the Bureau of Reclamation under the direction of the Secretary of the Interior wherever the dominant function of such works is other than navigation and flood control." This recommendation on page g of the report, is based on the discussion of the proposed division of operational authority in numbered paragraph 7, on page b. This paragraph proposes that, in effect, construction and operation of the features of the plan be divided between the Bureau of Reclamation and the Corps of Engineers on the basis of the dominant function of each feature, features in which navigation and flood control are the dominant functions to go to the Corps, all other features to be operated by the Bureau of Reclamation. The report in paragraph 7, adds: "In like manner, agencies with juris-

diction over other functions should be recognized." Inasmuch as the Office of Indian Affairs is exercising on Indian lands functions identical with those exercised by the Bureau of Reclamation on non-Indian lands, the language of the report seems to exclude the Indian Service from any participation in the planning, design, construction and operation of irrigation and power projects on Indian lands. I assume that this omission was unintentional and propose that it be corrected by changing the language of paragraph 7, page b, as follows: In line 9, after the words "All irrigation features" insert "except those on Indian lands or predominantly serving Indian lands which shall be constructed and operated by the Office of Indian Affairs." Similarly in line 12, at the end of the sentence reading "All reservoirs in which irrigation, restoration of surface and ground waters, or power, are dominant, should be operated by the Bureau of Reclamation" the following words should be added "except reservoirs on Indian lands or predominantly serving Indian lands which shall be operated by the Office of Indian Affairs."

Indian Service lands and irrigation projects are scattered throughout the Missouri River Basin. Many of the features proposed by the plan are in part or in whole based on Indian lands, affect Indian water rights and existing Indian irrigation projects. In order to make possible a reasonable degree of Indian Service participation in the planning, construction, and operation of those irrigation and power features vitally affecting Indian interests, I propose that language be added to paragraph (b) of the recommendations, on the bottom of page g, to make this recommendation read as follows:

(b) That all works that may be authorized under the approved plan be constructed, operated, and maintained by the Bureau of Reclamation under the direction of the Secretary of the Interior wherever the dominant function of such works is other than navigation and flood control,

except that the Office of Indian Affairs shall construct and operate those works on Indian lands or serving Indian lands predominantly.

I request that these modifications in the language of the report be made before the report is submitted to the Congress.

The modifications in the language are deemed necessary in order to protect the Indian interests under the Winters decision and the terms of the Leavitt Act. They bring the recommendations into line with the Departmental policy as laid down in the Secretary's report on Senate Joint Resolution 55, by Wheeler, to transfer all Indian irrigation functions to the Reclamation Bureau, a proposal vigorously opposed by the Department and your Bureau.

Sincerely yours,

WILLIAM ZIMMERMAN, JR.,
Assistant Commissioner.

LETTER FROM THE CHIEF OF ENGINEERS, WAR DEPARTMENT

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, April 25, 1944.

Mr. H. W. BASHORE,
Commissioner, Bureau of Reclamation,
Department of the Interior, Washington, D.C.

MY DEAR MR. BASHORE: Receipt is acknowledged of your letter of April 20, 1944, transmitting copies of your report on the Missouri River Basin and requesting comment thereon by April 25, in order that the report may be submitted to the Bureau of the Budget on the scheduled date of May 1, 1944.

The general comprehensive plan of this Department for flood control and other purposes as contained in House

Document No. 475, Seventy-eighth Congress, contemplated that that plan would be augmented by appropriate projects of other agencies duly constituted by law to perform such work. It appears that the upstream tributary reservoirs proposed in the report of the Bureau will fit into the expanded comprehensive plan for flood control and other purposes, provided main stem storage is not substantially reduced.

I note that your plan substitutes the Mission Dam for the Livingston project included in House Document 475 and greatly reduces the size of the Boysen Dam. Further studies by the Bureau of Reclamation and the Corps of Engineers preparatory to construction can definitely establish the developments for the Yellowstone and Big Horn Basins.

Similarly the plan in your report for the Kansas River Basin, including the Republican and Smoky Hill Rivers, differs in some details from the War Department's plan as reported in House Document 475. In this river basin the fundamentals of the two plans are similar and I believe that the details can be worked out satisfactorily through cooperation as the projects are constructed.

With regard to the main stem dams in North and South Dakota, it is noted that the Bureau's report contemplates 10,250,000 acre-feet less storage than proposed in House Document 475. Since reservoirs on the main stem are the most beneficial from the standpoint of flood control below Sioux City and are vitally needed for cyclic storage, I consider that the maximum practicable amount of storage must be provided on the main stem in North and South Dakota. In this connection the plan outlined in House Document 475 makes possible the inclusion of a high dam at Oahe if found feasible from an engineering and economic standpoint. In any event a high dam at the Garrison site is essential, and a reregulating reservoir at Gavins Point is necessary.

Although I am not convinced that storage in reservoirs far upstream on the headwater tributaries would have appreciable effects on flood stages along the main river below Sioux City and on the Mississippi River, I agree that those projects would be of great benefit to agriculture, to the prevention of local flood damages downstream from the dam sites and to the solution of silting problems.

It is noted that your plan includes the irrigation of approximately 1,000,000 acres in the Souris project outside of the Missouri River Basin. The best over-all use of the multiple-purpose reservoirs in the Missouri River Basin would permit a diversion of water out of the basin into the Dakotas, urgently needed for domestic use and for other purposes, after sufficient water has been conserved and stored to provide for such diversion. However, until the existing and foreseeable needs for the conservation and use of water within the Missouri River Basin have been satisfied there is a question in my mind as to the advisability of developing a large-scale irrigation project outside the Missouri River Basin which would deprive the basin of a part of its natural water supply. In my opinion the advisability of such a large diversion should be the subject of further study and consideration.

The time available has not permitted a thorough study of the allocation of costs and benefits as contained in your report. I can state, however, that in view of the information contained in your report that the projects proposed will provide a dependable low water flow at Sioux City of something less than now exists, I do not understand the equity of charging to navigation a large part of the cost of the development. Also I question your method of computing flood-control benefits. It is noted that by the methods used the costs allocated to flood control and navigation under the heading "Repayment and returns" are very large compared to costs allocated to irrigation, whereas irrigation benefits are represented as several times the combined benefits to flood control and navigation.

It is essential that the main stem reservoirs in North and South Dakota be built, operated, and maintained by the Corps of Engineers as stated in my report and in your letter of December 17, 1943, both printed in House Document 475. Tributary reservoirs should, when advisable from the standpoint of basin-wide development, be constructed, operated, and maintained by the agency with dominant interest under existing law. In all reservoirs, utilization of storage for flood control should be in accordance with regulations prescribed by the Secretary of War and utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior.

As stated before, my report contained in House Document No. 475 contemplates that the broad framework for the Missouri Basin as recommended in that document will be augmented by appropriate work of other agencies duly constituted by law to perform such work. I am sure that through the continued cooperative efforts of all concerned the details of the improvements can be worked out in a progressive manner as conditions warrant. I appreciate the opportunity to comment on the Bureau's report and I look forward with confidence to the development of the comprehensive and flexible plan for the Missouri Basin through the coordinated and cooperative efforts of Federal, State, and local agencies to accomplish the best overall use of its water resources.

Very truly yours,

E. REYBOLD,
Major General,
Chief of Engineers.

LETTER FROM THE DEPARTMENT OF AGRICULTURE

DEPARTMENT OF AGRICULTURE,
Washington, April 25, 1944.

Mr. H. W. BASHORE,
Commissioner, Bureau of Reclamation,
Department of the Interior, Washington, D.C.

DEAR MR. BASHORE: We received from Maj. Gen. E. Reybold, Chief of Engineers, War Department, on April 22, a copy, marked "confidential," of the Missouri River Basin report of the Bureau of Reclamation with the telephone request that we transmit our comments on it to you by April 25 in order that you might submit the report to the Bureau of the Budget by May 1, 1944.

The responsibilities of this Department do not, of course, embrace the design or construction of major engineering works for irrigation, flood control, power, and other purposes, but we are very much interested in land and water development and use of concern to agriculture and rural people. The benefits from soundly conceived irrigation, power, flood control, navigation, wildlife, recreation, and other multiple-purpose development on the Missouri and its tributaries will accrue in considerable measure to farm people and rural interests and will have a direct bearing on the use made of the national resources of the area. In particular, the potentialities of providing irrigation where economically feasible to farming areas of low or uncertain rainfall are large and important in the Northern Great Plains.

The short time available has permitted only a very general review of the report. We are glad to see that many of the projects proposed in the report appear to be essentially in harmony with those that have been proposed by the Corps of Engineers, War Department. We are not in position to judge the relative engineering merits of such proposals as are not reconciled but believe that through continued cooperative consideration by the

agencies concerned a mutually acceptable means can be found to meet the broad objectives of both reports.

Various programs of the Department will be of material assistance in the achievement of the agricultural objectives in the coordinated plan for basin-wide development. We shall be glad to cooperate to the full extent our resources permit.

Sincerely,

E. H. WIRCKING,
Land Use Coordinator.

LETTER FROM THE FISH AND WILDLIFE SERVICE

DEPARTMENT OF THE INTERIOR,
FISH AND WILDLIFE SERVICE,
Chicago, Ill., May 6, 1944.

Mr. H. W. BASHORE,
Commissioner, Bureau of Reclamation,
Washington, D.C.

MY DEAR MR. BASHORE: Reference is made to your letter of May 2 asking for any comment we may have to offer in regard to your report, "Conservation, control, and use of water resources of the Missouri River Basin."

I regret to say that this report was not received in our Chicago office early enough for us to review it carefully before your deadline on May 1. As yet we have had opportunity to make only a casual examination of the report, but we feel that in the main it is a good report and considers well the interests of the various agencies.

Thus far, there is only one statement to which exception might be taken, and that perhaps would depend upon interpretation of your statement. I refer to a statement in the report of the Board of Review. We heartily subscribe to the first part of paragraph 5, page 6; but we feel that the sentence—"To the extent that the uses

of water are competitive, the use of water for domestic, agricultural, and industrial purposes should have preference."—might be open to question. Considering the area as a whole, this statement is probably correct; but we could not subscribe to the thought that any particular plot or block of agricultural land, regardless of how submarginal it might be, should have prior use of water over an important muskrat marsh or other wildlife project. Likewise, every industrial use might not have so much value from, the national standpoint as the wildlife benefits.

As a whole, the report seems to be well prepared and gives fair consideration to diverse interests.

Sincerely yours,

ALBERT M. DAY,
Acting Director.

BOARD OF REVIEW'S REPORT TO THE COMMISSIONER

UNITED STATES DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Denver 2, Colorado, April 14, 1944.

From Board of Review.
To Commissioner.

Subject: Report on Conservation, Control, and Use of Water Resources of the Missouri River Basin.

1. Pursuant to instructions in your letter of February 2, 1944, the undersigned convened as a special board of review in Denver, Colo., April 10 to 13, 1944, to consider the report of April 1944 on the Conservation, Control, and Use of Water Resources of the Missouri River Basin, prepared by the Bureau of Reclamation staff of region 6, assisted by consultants, and representatives of

other Government agencies. The results of our review of the report are respectfully submitted herein.

2. The water of the Missouri River system is a primary national resource which, up to the present time, has been inadequately controlled and developed. The two major problems of the basin are the control of devastating floods along the lower river and the stabilization of agriculture in the Dakotas and in eastern Montana.

3. The river and its basin long have been studied by Federal, State, and other agencies, but until recently the studies have not been coordinated or sufficiently broad to comprehend and outline a unified plan for the conservation and beneficial uses of water so as to realize the greatest procurable economic returns and human benefits for the entire region. In our opinion, the report presents a plan which, if carried out, would adequately meet these objectives. It is a comprehensive plan for the highest beneficial use of the waters of the basin. It provides for flood control, navigation, irrigation, power development, domestic and industrial water supplies, silt control, recreational use of waters, conservation of fish and wildlife, and pollution abatement, and will assist in the restoration and maintenance of groundwater levels and inland lakes.

4. The report is the result of long and intensive engineering, scientific, and economic study. The plan is technically and economically sound. It is not proposed or expected that the program as a whole should be undertaken immediately or at one time, but it should progress by starting with the parts that are urgently needed and continue as rapidly as funds become available and economic conditions demand. The greatest benefits will be attained through coordination of the advice and work of all interested Federal, State, and local agencies.

5. To the extent that the several functions of water control and utilization are conflicting, preference should be given to those which make the greatest contribution

to the well-being of the people and to the areas of greatest need. To the extent that the uses of water are competitive, the use of water for domestic, agricultural, and industrial purposes should have preference. The plan would meet these objectives.

6. In determining the justification for this development and the subdivisional features thereof, the report recognizes and the Board confirms the principle that a project or a broad development is justified if the total value of all the benefits to be derived from it exceeds the total cost, whether or not all costs can be recovered from the direct beneficiaries. The report summarizes the benefits of the basin-wide project, and finds that they exceed the estimated costs in the ratio of 2.57 to 1. The Board concurs in this finding.

7. The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where the flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. All irrigation features should be operated by the Bureau of Reclamation or its agents. All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned. In like manner, agencies with jurisdiction over other functions should be recognized. The Bureau of Reclamation should construct and operate all power-transmission facilities, and should have the responsibility for the disposal of all power generated.

IRRIGATION

8. Land-use adjustments needed to stabilize the agriculture of the basin and mitigate the effects of future droughts can best be promoted by progressive development of the irrigation potentialities of the area. In addition, hundreds of thousands of new residents of the area can be provided opportunities to establish homes and to earn for themselves an adequate level of living. Many projects will be of prime importance in any program for the rehabilitation or settlement of returning servicemen and dislocated war workers. Irrigation water users should pay for the service rendered them an amount commensurate with the benefits they receive, and their payments should be based on ability to pay out of earnings of the irrigated land. Many of the project areas will be served with water by pumping. The power used in pumping will be provided from the seasonal output of installations proposed in the report. The power should be paid for as an integral part of operation and maintenance charges, and the resulting operation and maintenance charges should be equalized throughout the area by integrating them with repayment charges and the total to the ability of the land served to produce returns for the farmer.

POWER

9. The average unit costs of power and energy for the power developments described in the report will be such as to accomplish the repayment of the construction costs of power development within a reasonable period of years and, in addition, will permit substantial contributions from power revenues to assist in the repayment of other project features as well as providing low-cost power for irrigation pumping purposes.

10. The market studies indicate the ability of the basin and contiguous areas to absorb in a relatively few years the power to be developed. The large number of comparatively high-cost fuel-burning generating plants

now operating in the area offer exceptional possibilities for sale of a large quantity of hydroelectric power as fast as it can be developed. This situation exists because of the immediate opportunity to eliminate high fuel and other generating costs by energy replacement in some cases, and by complete retirement of obsolete plants in others. Growth of load will soon absorb the balance of the output.

11. The low-cost power to be developed should be given the widest possible distribution for the benefit of the whole region. This could be accomplished best by clothing the Bureau of Reclamation with the responsibility for its distribution and sale. Preference in sales should be given to public bodies and cooperatives.

FLOOD CONTROL

12. The main-stream reservoirs in South Dakota, together with the reservoirs on the tributaries in eastern Kansas and in Missouri and the levee system, will provide the protection needed by the fertile bottom lands and the important cities along the Missouri River below Yankton. They will also aid in the control of Mississippi River floods below St. Louis. The reclamation plan supplements such flood control by the addition of a number of multiple-purpose reservoirs on tributaries of the Smoky Hill River and on the headwaters of the Republican River.

13. On the headwaters of the Missouri River, and its western tributaries in the Dakotas, and on the headwaters of the Platte River, the reclamation plan provides necessary flood control in the areas most seriously menaced, in the main, through the operation of multiple-purpose reservoirs.

NAVIGATION

14. Navigation possibilities are limited to the Missouri River up to Sioux City. While the traffic on this stream

has never been impressive even below Kansas City, the Missouri River carries potentialities as an important waterway in the future as Kansas City, Omaha, Sioux City, and their tributary areas continue to grow. The utilization of the stream as a waterway should be planned, and such planning should be adapted to the flows to be expected with justified upstream development. The storage facilities contained in the reclamation plan provide the necessary stream regulation to insure a sustained and well-regulated flow through the years, regardless of the vagaries of precipitation.

SILT CONTROL

15. The control of silt is important in many localities. The most urgent silt problems are in the Big Horn River Basin, but the problem is also serious in the Yellowstone River and its other tributaries as well as in the western tributaries of the Missouri River in the Dakotas. The storage control provided throughout the Missouri River system above Yankton will desilt the streams and eliminate most of the silt problems in connection with operations of irrigation and municipal water systems. The retention of the silt by these means will reduce the cost of maintaining the channels in the navigation section of the Missouri River and the Mississippi River below St. Louis.

DOMESTIC, MUNICIPAL, AND INDUSTRIAL WATER SUPPLIES

16. In many parts of the basin, surface waters are relied upon for domestic and municipal water supplies. In the future there will also be greater requirement for industrial water supplies. Regulation of flows of many tributaries as proposed, and the diversion of water from the Missouri River into eastern North Dakota and the Red River Valley, and into the James River Valley in South Dakota, will benefit many cities, towns, and populous areas by increasing low-water flows and restoring ground-water levels.

17. Some communities that depend on wells are faced with the necessity of searching for new water sources because of lowering ground-water levels. The falling water tables have also dried up or reduced to stagnant pools many old lakes in the northern plains. The plan calls for the restoration of some of these lakes, and will also have a beneficial influence on water tables through percolation of water from canals, irrigated farms, and small stream channels.

FISH AND WILDLIFE

18. The Missouri River Basin has areas of outstanding importance in the conservation of fish and wildlife. Notable among them are mountain fishing streams, and the waterfowl refuges and breeding grounds in the northern plains. The development of the water resources of the basin will adversely affect some of the existing facilities, but it will also create exceptional opportunities for expanding the fish and wildlife programs. No unnecessary injury should be inflicted, and construction plans should include such safeguards as fish screens at canal and other intakes, hold-over conservation pools in reservoirs (for maintenance of proper water elevations and stream flows during spawning and nesting seasons whenever practicable), and other good conservation practices. Facilities destroyed or damaged should be replaced by others of equal utility as a part of the new construction in the conservation programs, wherever possible.

RECREATION

19. The basin includes parts of three great National Parks, Yellowstone, Glacier, and Rocky Mountain along the Continental Divide, numerous national forests, and many smaller recreational facilities ranging from fishing grounds in the mountains to historical sites on the plains; but there are large areas where recreational facilities are inadequate. The restoration of Devils Lake and the con-

struction of the numerous proposed reservoirs will provide recreational opportunities of major importance within these areas. These opportunities should be capitalized through stocking the lakes and reservoirs with fish, and providing facilities that will be needed to care for the public, such as campgrounds, boat landings, and shelters.

POLLUTION ABATEMENT

20. Along the Red River of the North, and in various other places within the basin, including some areas bordering the Missouri River itself, waters are polluted by discharge of untreated sewage into streams. In periods of low flow, pollution has become serious, threatening the safety of water supplies and creating nuisances. Diversion of water into the Sheyenne River and thence into the Red River of the North will abate some of these conditions. So far as possible, sufficient low-water flows should be maintained throughout the basin to prevent dangerous pollution; but this should not be considered as a substitute for the treatment of sewage where necessary to maintain proper sanitary conditions and the use of stream flows for dilution of sewage should be held to a minimum.

HYDROLOGY

21. Reliable stream-flow records covering sufficient time to reflect variations in flow are a prerequisite to sound project planning, to assure proper control and full utilization of the waters, and to avoid waste of construction funds on the one hand, and the hazards of water shortages, flood damages, and power shortages, on the other. No run-off records are available for many of the smaller streams, and on the larger streams the available records are often inadequate because of insufficient stations, particularly at critical locations. The present inadequate program of stream gaging being conducted by State and Federal agencies should be greatly expanded at once, to the end that the tentative project plans may

be confirmed or modified on the basis of more complete stream-flow records, before it becomes necessary to start construction. This situation is particularly applicable to the numerous small projects on the minor tributaries. The appropriations for the United States Geological Survey for stream-gaging work should be substantially increased, and the lack of available State appropriations for matching Federal funds should not be permitted to delay a program at least sufficient to provide the needed records at many key stations.

DESIGNS AND ESTIMATES

22. The project plan includes hundreds of major engineering works, such as dams and power plants, and thousands of important structures. The plans on which the estimates are based were necessarily of a preliminary nature. At many of the dam sites, exploratory work has been carried far enough to obtain dependable basic data. At other sites, further exploratory work must be undertaken before details of the structures can be determined and better estimates made. All the works proposed in the report are of the same general type which the Bureau of Reclamation has been constructing in the West since 1902, and no novel or unprecedented problem are involved. All cost estimates are tentative, and are subject to revisions in the light of further information which must be developed by exploratory work and detailed design studies before construction is undertaken. A lump-sum allowance has been included for contingencies for unforeseen conditions, but no allowance has been included for major economic changes. All estimates are based on costs as of January 1, 1940, and an appropriate factor will therefore have to be applied to conform such estimates to prices existing at the time the construction of any feature of the development is initiated.

INITIAL CONSTRUCTION PROGRAM

23. The following list of projects is submitted as the initial stage of an orderly program to effectuate a plan of development presented in the report. The list is confined to projects or project features which should, in the opinion of the Board, be constructed by the Bureau of Reclamation:

Colorado:

Transmountain diversion projects were not considered a part of this basin.

Kansas-Nebraska:

Bostwick.
Cedar Bluff.
Frenchman-Cambridge.
Kirwin.
North Republican (Wray) (Colorado-Nebraska).
Pumping.

Montana:

Canyon Ferry Reservoir.
Glasgow Bench Pumping.
Hardin (including Yellowtail Dam).
Marias.
Missouri-Souris (Montana division).
South Bench.
Yellowstone River Pumping units.

North Dakota:

Heart River.
Knife River.
Missouri-Souris (North Dakota division).
Missouri River pumping units (5).

South Dakota:

Angostura.
Grand River (Shadehill-Bluehorse).

Oahe (James River).
Rapid Valley (including Brennan Reservoir).

Wyoming:

Big Horn pumping units.
Big Horn Project (Boysen Dam).
Glendo Reservoir.
Kortes.
Owl Creek.
Paintrock.
Riverton.
Shoshone project extensions.

Power transmission lines.

RECOMMENDATIONS

It is recommended:

(*a*) That the general plan for the development of the basin as contained in the report be approved subject to such modifications and changes as may be indicated, from time to time, as the plan is effectuated.

(*b*) That all works that may be authorized under the approved plan be constructed, operated, and maintained by the Bureau of Reclamation under the direction of the Secretary of the Interior wherever the dominant function of such works is other than navigation and flood control.

(*c*) That the Bureau of Reclamation under the direction of the Secretary of the Interior make all arrangements for the sale and distribution of electric energy generated at all hydroelectric developments hereafter constructed by any Federal agency within the basin as defined in the report, and be authorized to construct, operate, maintain, and improve such electric transmission lines and substations as it finds necessary or desirable in connection therewith.

(*d*) That the initial construction program as hereinabove presented be adopted and that an appropriation of

$200,000,000 be authorized for the prosecution of construction work on the first stage of the program and for the continuation of investigations on the general plan of development.

E. B. DEBLER,
Chairman, Director of Branch of Project Planning.

S. O. HARPER,
Chief Engineer, Director of Branch of Design and Construction.

H. F. MCPHAIL,
Director of Branch of Power Utilization.

W. F. KUBACH,
Director of Branch of Fiscal and Administrative Management.

D. S. STUVER,
Assistant Director of Branch of Operation and Maintenance.

SUMMARY FOREWORD

Wheat, butter, meat, wool, leather, and many other valuable commodities used by the people of the United States come from a wide, sparsely populated area which lies between the highly developed Middle-West and Eastern States and the growing far West States, and extends from the Canadian border far down into Texas, almost separating the country into two distinct parts. This Great Plains area and the mountainous country which bounds it on the west yield not only foodstuffs and textile materials which are important to the prosperity of the country, but also certain valuable and strategic minerals, and a wealth of oil. Economically, it is a very important part of the Nation.

The cities and large towns, and much of the best agricultural land in the Great Plains area lie in the flood-

plains of the rivers, and occasionally, like some eastern cities and farm lands, they suffer great damage from floods. The greater part of the area experiences serious variations in rainfall, and corresponding fluctuations in crop yields. Occasionally, it suffers long periods of drought, during which losses far exceed those due to floods. The effects of such disasters are not confined to the Great Plains; they extend to the whole country, because they disturb commerce in the hundreds of millions of dollars' worth of materials and articles which are exchanged annually between residents of the Great Plains States and residents of other States. On some occasions, enormously expensive relief and rehabilitation programs have been necessary after floods or droughts because, in the interest of national prosperity and security, the area cannot be abandoned, nor allowed to lose the fruits of developments by private initiative that are, or can be made to be, economically sound.

Man cannot exercise control over the weather—the fundamental cause of droughts and floods; but by devices known to engineers, he can modfiy floods and their effects, and by practices known to engineers and agricultural scientists he can alter the farming facilities and the farm and ranch practices in some localities so as to diminish both the direct and the indirect effects of droughts. For years, the Corps of Engineers, United States Army, has been engaged in designing and constructing river improvements for the purposes of reducing flood damages and aiding navigation; the Bureau of Reclamation has been putting water on arid land and finding supplemental water for distressed irrigation farmers; and the Department of Agriculture, the State colleges, the State experiment stations, and the county agricultural agents have been laboring to improve agricultural facilities and practices. In order to perform efficiently and to handle large-scale projects, these and other government and local agencies must cooperate closely, and in accord with broad plans, each plan being

inclusive of all resources, problems, and possibilities that are properly related in one unit. So far as the cooperative activities of the Corps of Engineers and the Bureau of Reclamation are concerned, a river basin is a suitable unit on which to base plans.

This report deals with a plan for the conservation and control of the water resources of the entire Missouri River Basin, which includes the northern Great Plains, and the use of such resources in watershed development. Every water resource and all feasible beneficial uses of water, such as aids to navigation, flood control, the irrigation of land, the producing of power, the restoration of surface and ground-water levels and of domestic and municipal water supplies, the abatement of stream pollution, silt control, fish and wildlife preservation, and recreation, were taken into account in an effort to formulate a basin-wide plan most likely to yield the greatest good to the greatest number of people. The plan is based on specific information with respect to the character and needs of different sections of the basin, and on experience in designing, building, and operating works of the kinds that will be required in the Missouri River Basin. It is adapted to development in stages, and to such modifications as changes in physical and economic conditions make necessary. Agriculture is and always will be the primary basis of the economy of the Missouri River Basin. On agriculture, other economic activities in the basin largely depend. This fact has been recognized in designing a plan for water-resource development for the basin.

Plans of the Corps of Engineers cover channel improvements from Sioux City to the mouth of the river and a number of reservoirs on the upper river, mainly for flood control and aid to navigation. Such existing and proposed developments are referred to or are described in House Document 475, Seventy-eighth Congress, second session, and in the documents referred to therein.

The plan here tendered incorporates the Corps of Engineers' proposed plans for flood control and aids to navigation in the river below Sioux City, with some modifications of Army plans for developments on the upper river, for the reason that certain reservoirs and related works further up in the river basin would facilitate navigation and flood control on the lower river, and, at the same time, serve other purposes.

This basin-wide plan provides for a number of reservoirs on the upper reaches of the Missouri River and its tributaries, for the purposes of storing water, and releasing it during periods of low flow. Such reservoirs will contribute to flood control not only on the lower river but at all points from the mouth of the river to the reservoir sites; they will aid navigation on the lower river by reducing flood damages to navigation works and by increasing the dry-season flow; they will enlarge the supply of water available for irrigation; and they will make practicable the generation of electrical energy at many places.

The irrigation of land in the basin, generally in relatively small blocks along the streams, will add to an unavoidably precarious dry farming and grazing economy a dependable type of agriculture which will have a stabilizing effect on whole communities; it will supplement the ranges in supporting a larger, better, and less hazardous livestock industry; and by increasing the population and the farm yield and income, it will reduce the per capita costs of government and raise standards of living and of citizenship. In periods of severe and long-continued drought, such as have occurred at long intervals, and may occur again, forage raised on irrigated land will support foundation breeding stock, at least, and so speed recovery from drought damages.

The storing of water and the regulating of stream flow for purposes of irrigation will contribute not only benefits to downstream navigation and flood control, but frequently, facilities for the production of power, one of the

chief sources of wealth and well-being. Electrical energy developed at dams and canal drops will be used to pump water to land above gravity canals; and surplus power will be sold for domestic, municipal, and industrial applications.

The distribution of irrigation water in canals and the maintenance of year-round flows in some streams that ordinarily go dry in summer will relieve water shortages, and improve ground-water supplies. Return flow from irrigated land, and water diverted for the specific purposes will raise or restore ground-water levels in some areas, and abate stream pollution.

Both the creation of reservoirs and the regulation and maintenance of stream flow will aid in fish and wildlife conservation.

Present and future plans of State agencies and of various Government agencies, such as the Indian Service, the Fish and Wildlife Service, the National Park Service, and the Bureau of Reclamation, as well as the War Department, the Department of Agriculture, and the Federal Power Commission should be coordinated, in order to avoid the waste incident to conflicting plans and duplication of effort, and in order to gain the advantages of large-scale, coherent works and operations.

Comparison of estimated costs with repayments and returns computed pursuant to existing legal requirements, and supportable on the experience of operating Federal projects for like purposes, justifies the conclusion that the value of the benefits to be derived from the recommended program will exceed the cost of the project, and warrant the recommendation that the construction of the project as planned be approved.

A general statement with respect to the Missouri River Basin and its economic problems, and a comprehensive plan for developing and utilizing its water resources is contained in this report. Supporting data are to be found in the reports and files of the Bureau of Reclamation and the Corps of Engineers.

* * *

MISSOURI RIVER PROJECT PLAN

SUMMARY OF COSTS, BENEFITS, AND RETURNS

FOREWORD

Nobody can prevent the sudden downpours nor the quick thaws that produce floods, nor avert drought, nor make rain fall at will. Man can mitigate the evils of flood and drought by intelligent management of his resources and by engineering works, and he can bring together artificially, water and land to make them yield food and shelter for him. Here are summarized, briefly, the benefits to be derived from the intelligent, coordinated development and use of the water resources of the Missouri River Basin.

The welfare of the residents of an area 1,300 miles long and 700 miles wide, extending from St. Louis, Mo., in the southeast, to Cut Bank, Mont., in the northwest, and from Denver, in the southwest, to Devils Lake, N. Dak., in the northeast, is influenced by the waters of the Missouri River and its tributaries. People living along the lower river want protection from floods at one season, and supplemental water for navigation at another. Residents of the western and northwestern sections of the Missouri River Basin want protection from local floods, water for irrigation, and power for various purposes. Some areas need water for domestic and sanitary uses.

Man cannot prevent the sudden downpours nor the quick thaws that produce floods; he can only distribute floodwaters in time and place, and so reduce their destructive powers. He cannot prevent drought nor make rain fall at will; he can only store water for use in dry seasons, and thus escape its worse effects. The plan proposed here recognizes these facts, and, also, the fact that, in order to make the waters of the Missouri Basin serve the greatest number of people to the greatest advantage, those waters must be conserved and used according to a

coordinated plan which must recognize all beneficial uses of waters, weigh their relative values, and make a compromise, from a basin-wide viewpoint, in each instance of conflict.

This plan proposes that a large number of reservoirs be created on tributaries of the Missouri River, in Colorado, Wyoming, Montana, North Dakota, South Dakota, Nebraska, Kansas, and Missouri, and that a small number of important reservoirs be built on the main stem of the river. All these reservoirs will serve one fundamental purpose, namely, that of impounding water in periods of heavy run-off from the land, and releasing it during periods of low stream flow.

In all cases, by impounding flood water, the reservoir will have beneficial effects in reducing flood hazards everywhere downstream. Water released from the reservoirs may serve one or several of many purposes. In the greater part of the basin, which is one of the important agricultural provinces of the United States, water is needed for irrigation, which will contribute to the further development of the Nation's resources, and will offset to some extent the disturbing effects of wide variations in rainfall. More than a hundred proposed irrigation projects, scattered through seven States, will in time add more than 4,000,000 acres of land to the stable farm resources of the country.

At many of the reservoirs, power plants will be built for the purpose of converting to electricity the energy available from the falling of water released. A network of transmission lines will connect the power plants with each other, with other power systems, and with power consumers' facilities. Much of the power will be used in pumping water for irrigation, but much more of it will be available for domestic, municipal, commercial, and industrial uses. Practically none of the power users will consume energy at a uniform rate throughout the year. Few, if any, of the power plants will be capable of gen-

erating at their maximum capacities throughout the year. Not all of the peaks of demand occur simultaneously, nor do all the periods of high productive capacity at the power plants. The transmission system will serve the double purpose of delivering power from a pool to the combined loads of consumers, and of shifting loads from plant to plant, in order to take advantage of their periods of high productive capacity.

The population and prosperity of this region cannot be expected to expand without further irrigation development, made and operated at costs within the ability of the irrigators to pay. In the plan proposed, irrigation pumping with its incidental power requirements plays a large part. The cost of such power will be an important element in the irrigators' annual expenses, and must be low if success is to be achieved. Experience and study indicate that the cost per kilowatt-hour should not exceed 2½ mills for energy delivered to major project pumping plants.

The capacities of the proposed reservoirs have been determined by two or more requirements—the impounding of flood waters as a means of reducing flood damages; the storing of water for the purpose of irrigating land, generating power, or supplying water for domestic, sanitary, or recreational and wildlife purposes; the storing of water to be released during the navigation season of the lower river; or the entrapping of silt. The releasing of water from the upstream reservoirs will be governed generally by the requirements of irrigation and power generation, and from the lower reservoirs by navigation needs.

Of the water that falls as rain or snow, much is lost by evaporation from land and from the surfaces of lakes and streams, and even more is consumed in plant growth; the remainder runs away to the sea. The building of reservoirs and the irrigating of land will increase evaporation losses, but the water so lost will be stored floodwater, or

will be replaced by stored floodwater. Water diverted from the Missouri River Basin for use in the northern and eastern parts of North Dakota will also reduce the annual run-off of the Missouri River, but it, too, will be taken from floodwaters, by means of reservoirs. Despite these losses and diversions, sufficient run-off and flow will remain when regulated by the proposed reservoirs to provide supplemental water for navigation on the lower river during normal low-water seasons.

Some areas drained by tributaries of the lower river, subject to flash floods, will be benefited little, if at all, by upstream conservancy works. They must depend for relief on local stream improvements.

Such a multiplicity of factors and such a mass of technical detail have necessarily entered into this study that it is entirely impracticable to place in one volume the data gathered in support of the findings as finally revealed in the proposed plan. Summing up, provisions are made for the irrigation of 4,760,400 acres of land not now irrigated, and a supplementary water supply will be furnished to 547,300 acres of land now having an inadequate water supply, thus benefiting a total of 5,307,700 acres. Proposed irrigation development is scattered throughout the drier portions of the basin, as follows:

[Table Omitted in Printing]

Some land and improvements in river bottoms will be flooded, but, with few exceptions, reservoirs will cover lands of little or no agricultural value. The area flooded is insignificant compared with the area to be benefited. Eliminating the Army's proposed Garrison Reservoir will preserve many improvements and will also preserve 50,000 acres of land, much of which will be irrigated. Indian land, public lands, and private lands and property have all been given the same consideration. Ample allowances have been made in cost estimates for the replacement of all improvements that will be destroyed.

Complementing irrigation development, the construction of 17 power plants is proposed, with an aggregate installed capacity of 758,500 kilowatts. These plants will be capable of generating 3,809,200,000 kilowatt-hours of firm energy annually. A transmission grid system is included in the plant to interconnect generating and pumping plants and to permit the delivery of power to all existing distribution centers, and to others on the fringe of the basin, within the probable market areas. These power plants are likewise distributed throughout the basin, as follows:

[Table Omitted in Printing]

Flood protection is afforded to all areas subject to inundation, throughout the length of the river, and on most of the main tributaries where the flood problem is acute. All of the reservoirs included in the plan afford some degree of flood protection inasmuch as they conserve floodwaters for use later, in irrigation or for navigation purposes. The plan includes the flood-control reservoirs proposed by the Corps of Engineers, as presented in House Document 475, 78th Congress, second session, or suitable substitute, and, in addition, many others not included in the Army plan. Excluding the reservoirs on tributaries of the lower Missouri, in the State of Missouri, the proposed capacity of which are not stated in House Document 475, 78th Congress, second session, a total of 89 reservoirs are included in the proposed basin-wide plan, with a combined capacity of 45,700,000 acre-feet, which is more than the average annual flow of the Missouri River at its mouth. Reservoirs have been so located as to desilt those streams in which the silt load is heavy, particularly the Big Horn, Powder, Republican, Smoky Hill, and that portion of the main stream from the mouth of the Yellowstone River to Kansas City.

An assured minimum and practically uniform flow in the main river from Sioux City to the mouth, for navigation purposes, will maintain navigability of that stream with much lower annual dredging costs than have heretofore been anticipated.

Minimum flows in all streams of the basin where sanitation conditions have often been impaired will be amplified to alleviate past dangers.

The numerous reservoirs to be built will increase recreation possibilities throughout the entire basin, in many places where such possibilities have been nonexistent before, and will also increase fish life. The restoration of Devils Lake will reestablish that community in its former place of importance as a tourist center. While some of the important wildlife refuges now in operation will be obliterated, many opportunities will be afforded for the substitution of equally good refuges, and the total number can be greatly increased. In cost estimates, adequate provisions have been made for replacing fish and wildlife facilities that will be destroyed or impaired.

BENEFITS

IRRIGATION

The benefits from the stabilization of agriculture in areas adjacent to the proposed irrigation units are not susceptible of evaluation. The direct benefits from irrigation are usually measured in terms of increases in gross crop values to be expected. Based upon the 1930-41 average of crop values on operating Bureau projects in the basin, after comparing soil and climatic conditions with those on existing projects, and separately determining the expected crop values for each of the 150 or more units in the plan, the estimated increase in crop values is expected to average $130,000,000 per year, exclusive of livestock. The irrigation of 4,760,400 acres of new land and the furnishing of supplemental waters to 547,000 additional acres, will furnish a stabilized diversified agricultural opportunity on 53,000 farms averaging 90 acres each. With an average of 4 persons per farm, rural population will be increased by 212,000. Statistics show that for every person on the farm at least 2 additional persons

can find a means of livelihood in adjacent towns and cities, thus making a prospective increase in total population of 636,000 in the Missouri Basin from irrigation development alone. The past 20-year trend of declining population will be reversed, the deficiencies will be overcome, and the final increases will resemble the 1900-20 trend.

The average assessed valuation per capita in the basin, exclusive of the more populous southeastern section, approximates $1,000. Increased valuation of more than $600,000,000 may thus be anticipated. This broadening of the tax base in the basin is a major justification for the project.

Evaluation of the probable feasible water-service charges on each individual unit in the plan shows that a total of $298,000,000 will be repaid to the Federal Government by irrigators within the 40-year period specified by Reclamation law.

POWER

Power market studies throughout the basin have shown that markets will be available as fast as firm power is produced, assuming that a reasonable length of time is required to place all of the plants in operation. Net revenues from the sale of power are estimated to be large enough to repay the cost of all power features with interest at 3 percent, and provide a substantial surplus applicable to other project costs. The power will have a value of $17,141,000 annually at full development, and that has been taken as a measure of its annual benefit.

FLOOD CONTROL

The report of the Army engineers on flood control of the Missouri River from Sioux City to the mouth proposes the construction of works costing a total of $661,000,000, the major features of which are incorporated in the plan herein proposed. In passing upon the Army plan, the Board of Engineers for Rivers and Harbors makes the following statement, justifying such an expenditure:

After thorough consideration, the Board concludes that the United States will profit by undertaking the improvements as recommended by the Division engineer, on a step by step basis.

Final evaluation of the flood-control benefits has not been made, but from available evidence it is reasonable to conclude that flood-control benefits are at least equal to the cost of the works providing such flood control as proposed by the Corps of Engineers. That figure is adopted as a measure of flood-control benefits, neglecting additional benefits derived from the Reclamation plan.

NAVIGATION

The benefits to navigation, by providing uniform flows in the lower river, do not lend themselves to close evaluation. Operation studies of reservoirs in this plan have shown that much of the storage capacity to be provided in proposed reservoirs is required for the control of high flows, and the subsequent release of stored water at uniform rates, to provide a steadily maintained flow for navigation. Allocations of costs in some of the reservoirs have been made to navigation, for this reason. The reservoirs in the lower Missouri will be of much benefit to navigation in the Mississippi, particularly at the Chain of Rocks, where much difficulty has been experienced in the past in providing sufficient depth for navigation. The aggregate benefits for navigation have been set at $166,600,000.

MUNICIPAL WATER SUPPLIES

Diversion of Missouri River waters into the James and Sheyenne Rivers in North Dakota and South Dakota will furnish municipal supplies to many towns and cities in those basins which have experienced extreme difficulty in obtaining sufficient water for their needs during the past decade. More than 19 cities and towns will thus obtain adequate and safe water supplies. Estimating the value of water to be furnished them at the rate of 10 cents per thousand gallons, total benefits for these purposes are

estimated at $20,000,000. No valuation is placed upon the water which will be supplied for the dilution of sewage and industrial wastes now poured into the streams and rivers without treatment. The value of such water is no doubt large, but no satisfactory basis has been found for its evaluation. Likewise no monetary value is placed upon restoration of ground water reserves or the creation of new recreational possibilities.

Benefits evaluated above are summed up as follows:

Summary of benefits

	Annual
Irrigation	$130,000,000
Power	17,141,000
Flood control	16,500,000
Navigation	4,165,000
Municipal water	500,000
Total	168,306,000

Annual costs

Operation, maintenance, repairs, and replacements:	
Irrigation	$7,725,000
Power	4,316,000
Flood control and navigation	4,500,000
Amortization of entire cost of project at 3 percent in 50 years	48,872,000
Total annual cost	65,413,000
Ratio of annual costs to annual benefits	1:2.57

Repayments and returns

Total estimated cost	$1,257,645,700
Allocation to—	
Flood control	419,300,700
Navigation	97,245,000
Subtotal	516,545,700
Balance repayable	741,100,000
Repayments from—	
Irrigation (40 annual payments)	298,000,000
Power (50 annual payments)[1]	423,100,000
Municipal (40 annual payments)	20,000,000
Total	741,100,000

[1] In addition to the repayments indicated, power revenues will also be sufficient to collect the interest charges on the costs allocated to power.

* * *

The need for large reservoirs on the main stream.—The Missouri-Souris unit, by diversions to its Northern Division through the Missouri Canal, pumping from the Fort Peck Reservoir to the Glasgow Bench division, and pumping from the main stream below Fort Peck, will use for irrigation practically all of the run-off of the Missouri River Basin above Fort Peck. The reauthorization of the Fort Peck Dam on May 18, 1938, was for the purpose of improving navigation on the Missouri River and for other purposes incidental thereto, including power. The plan herein presented makes irrigation a primary use of water, and substitutes other storage downstream for the Fort Peck Reservoir, to serve navigation and other purposes.

Water supply studies indicate that additional reservoirs on the river in South Dakota will be necessary for navigation, flood control, irrigation, and other uses. In 1943, a record-breaking flood occurred as a result of snow melting rapidly on frozen ground in the Missouri watershed in North Dakota. This flood dramatized the need for flood control on the Missouri River in the Dakotas. It was followed a month or two later by additional floods in the lower river, which originated below Kansas City. These events confirmed the opinion that large reservoirs are necessary on the Missouri, and to meet the requirements the construction of three dams is proposed.

The Oahe unit.—The most favorable location for a large reservoir on the main Missouri in South Dakota is about 8 miles north of the city of Pierre, the capital. The proposed Oahe Dam, 192 feet high, with a crest length of 7,000 feet, will create a reservoir of 19,600,000 acre-foot capacity, and will back the water up the Missouri River to the city of Bismarck, N. Dak. The reservoir will serve many purposes, the principal of which are the irrigation of a large tract of land in the James River Basin, regulation of Missouri River flows for navigation purposes, power production, and flood control. It lies below the Yellowstone River, the largest of all Missouri

River tributaries, contributing more water than the Upper Missouri River, itself.

Water in the Oahe Reservoir will be maintained at such an elevation that a pumping plant on the left bank, by lifting water an average distance of 110 feet, to a canal approximately 125 miles long, can serve the Oahe unit lands, an irrigable area of 750,000 acres in the James River Valley. Near the end of this main canal, the water pumped at Oahe will be dropped 241 feet, and will develop sufficient power to offset that required for lifting it out of the Missouri River. The drop and power plant will be about 35 miles west of the city of Huron. At the tail-race of the power plant, water will be divided, a larger portion of it flowing northward in a long canal to the vicinity of Aberdeen, and the remaining part of it flowing southeastward to the city of Mitchell. The area to be irrigated lies west of the James River, in a strip about 20 miles wide and about 80 miles long.

Water stored in the Oahe Reservoir will be available for navigation purposes on the lower river, as a substitute for water taken from the Fort Peck Reservoir for irrigation and other purposes. Ample storage capacity for floodwaters will be provided, to reduce downstream flows to the safe capacity of the river channel from Sioux City to Kansas City. The reservoir will also have spare capacity to store the anticipated silt load of the river for an indefinite period after upstream reservoirs are completed. In conjunction with additional reservoirs below Oahe, sufficient power can be produced to justify an installed capacity of 150,000 kilowatts at Oahe.

* * *

APPENDIX C

78th Congress
2d Session

SENATE

Document
No. 247

MISSOURI RIVER BASIN

REPORT

OF A

COMMITTEE OF TWO REPRESENTATIVES EACH FROM THE CORPS OF ENGINEERS, U.S. ARMY, AND BUREAU OF RECLAMATION, APPOINTED TO REVIEW THE FEATURES OF THE PLANS PRESENTED BY THE CORPS OF ENGINEERS (HOUSE DOCUMENT NO. 475) AND THE BUREAU OF RECLAMATION (SENATE DOCUMENT NO. 191) FOR THE COMPREHENSIVE DEVELOPMENT OF THE MISSOURI RIVER BASIN

Supplemental to Senate Document No. 191 and
House Document No. 475, 78th Congress

[LOGO]

PRESENTED BY MR. O'MAHONEY
NOVEMBER 21, 1944.—Ordered to be printed

United States
Government Printing Office
Washington : 1944

MISSOURI RIVER BASIN

OCTOBER 25, 1944.

To the SECRETARY OF WAR and the SECRETARY OF THE INTERIOR:

1. In view of the questions raised regarding the differences between the separate plans presented by the Corps of Engineers (H. Doc. 475, 78th Cong., 2d sess.) and the Bureau of Reclamation (S. Doc. 191, 78th Cong., 2d sess.) for the comprehensive development of the Missouri River Basin, a committee, composed of two representatives each from the Corps of Engineers and the Bureau of Reclamation, was appointed to review the engineering features of the two plans with a view of reconciliation between them.

2. The committee met at Omaha, Nebr., on October 16 and 17, 1944, discussed the various features of both plans, examined the supporting data for each plan, and prepared the enclosed joint engineering report. The joint engineering report points out that by making appropriate modifications it is possible to eliminate existing differences between the two plans.

3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:

(*a*) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.

(*b*) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

(*c*) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

4. For convenience in referring to the joint engineering report the following comparable six subdivisions contained in the report of the Bureau of Reclamation, Senate Document 191, Seventy-eighth Congress, second session, have been used.

(*a*) Upper Missouri River Basin.

(*b*) Yellowstone River Basin.

(*c*) Missouri River—Fort Peck to Sioux City.

(*d*) Minor western tributaries.

(*e*) Niobrara, Platte, and Kansas Rivers.

(*f*) Lower Missouri Basin.

UPPER MISSOURI RIVER BASIN

5. The plan presented in House Document 475, Seventy-eighth Congress, second session, does not specifically designate any units in the upper Missouri River Basin subdivision, although provisions are made for desirable and necessary projects in this area. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the construction of 19 reservoirs with a total storage capacity of 3,359,950 acre-feet for flood control, silt control, the development of hydroelectric power, the irrigation of 460,900 acres of new lands, and the provision of a supplemental water supply for 208,700 acres of land now being served with an inadequate water supply. There is no conflict in the proposed plans of the two agencies for the upper Missouri River Basin subdivision.

YELLOWSTONE RIVER BASIN

6. The plan presented in House Document 475, Seventy-eighth Congress, second session, provides for the construc-

tion of Boysen Reservoir with a storage capacity of 3,500,000 acre-feet and the Lower Canyon Reservoir with a capacity of 2,250,000 acre-feet to be operated for flood control, irrigation, navigation, power, and other purposes. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, provides for the construction of 27 reservoirs located on various streams in the Yellowstone River subdivision with a total storage capacity of 4,285,200 acre-feet; the reservoirs to be operated for flood control, silt control, the development of hydroelectric power, the irrigation of 509,560 acres of new lands, and the provision of a supplemental water supply for 204,500 acres of land now being served with an inadequate water supply. It was concluded that the plan described in Senate Document 191, Seventy-eighth Congress, second session, would be adequate to accomplish the objectives of the plan described in House Document 475, Seventy-eighth Congress, second session.

MISSOURI RIVER—FORT PECK TO SIOUX CITY

7. The plan presented in House Document 475, Seventy-eighth Congress, second session, contemplates the construction of five additional multiple-purpose reservoirs on the main stem of the Missouri River for flood control, navigation, irrigation, power, domestic and sanitary purposes, wildlife, and recreation, as shown in the following table:

Project	Location	Approximate gross storage capacity (acre-feet)
Garrison	Near Garrison, N. Dak.	17,000,000
Oak Creek	Near Mobridge, S. Dak.	6,000,000
Oahe	Near Pierre, S. Dak.	6,000,000
Fort Randall	Near Wheeler, S. Dak.	6,000,000
Gavins Point	Near Yankton, S. Dak.	200,000

The plan also provides that as soon as substitute storage is built on the main stem of the river, the Fort Peck

Reservoir will be operated as a multiple-purpose reservoir primarily in the interest of irrigation.

8. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the use of Fort Peck Reservoir primarily for irrigation purposes, also for navigation, flood control, silt control, and power, and the construction of main stem reservoirs to be operated for flood control, irrigation, navigation, power, silt control, and other purposes, as follows:

Project	Location	Approximate gross storage capacity (acre-feet)
Oahe	Near Pierre, S. Dak.	19,000,000
Fort Randall	Near Wheeler, S. Dak.	5,100,000
Big Bend	Near Joe Creek, S. Dak.	250,000

Senate Document 191, Seventy-eighth Congress, second session, also includes four inland reservoirs to assist in regulating the water diverted from the main stem and the irrigation of 2,292,900 acres of new lands in the Missouri River—Fort Peck to Sioux City subdivision.

9. After full discussion of the various features of the two plans in this subdivision the following main-stem reservoirs were recommended in the joint engineering report in order to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses.

Project	Location	Approximate gross storage capacity (acre-feet)
Garrison	Near Garrison, N. Dak.	17,000,000
Oahe	Near Pierre, S. Dak.	19,000,000
Fort Randall	Near Wheeler, S. Dak.	5,100,000
Big Bend	Near Joe Creek, S. Dak.	250,000
Gavins Point	Near Yankton, S. Dak.	200,000

The final storage capacities to be selected for the above reservoirs will be jointly agreed upon after more detailed plans and cost estimates have been made.

10. The Garrison Dam, Reservoir, and power plant was included in the coordinated plan as it provides a large volume of useful storage capacity for flood control, navigation, and irrigation, and permits the utilization of approximately 160 feet of head for the development of hydroelectric power in an area capable of absorbing the potential output and which, otherwise has no prospective source of abundant low-cost power. A large reservoir at the Garrison site, situated immediately below the Yellowstone River with its large silt contribution, will prolong materially the life of downstream reservoirs.

11. The selection of the high Oahe Dam, Reservoir, and power plant as proposed in Senate Document 191, Seventy-eighth Congress, second session, floods out the Oak Creek Dam, Reservoir, and power plant as proposed in House Document 475, Seventy-eighth Congress, second session. The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes. If the Oahe Reservoir is constructed to the elevation proposed in Senate Document 191, Seventy-eighth Congress, second session, a greater storage capacity will be provided than contemplated in the low Oahe and Oak Creek Reservoirs at considerably less cost.

12. The Fort Randall Dam in House Document 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, utilizes the same site. However, House Document 475 contemplates a normal pool level at 1,375 mean sea level whereas Senate Document 191 contemplates a pool level at 1,365 mean sea level, in order to not interfere with the Big Bend power plant located near the upper limits of the reservoir. The Big Bend project is considered highly de-

sirable in the ultimate development inasmuch as approximately 60 feet of head is thereby made available for the development of hydroelectric power. The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods. The plan also utilizes practically all of the available power head in the Missouri River between the mouth of the Yellowstone River and the Gavins Point Dam.

MINOR WESTERN TRIBUTARIES

13. The plan of development presented in House Document 475, Seventy-eighth Congress, second session, does not specifically designate any units in the minor western tributaries subdivision, although provisions are made for desirable and necessary projects in this area. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, provides for the construction of 15 reservoirs with a total storage capacity of 1,237,000 acre-feet, the reservoirs to be operated for flood control, silt control, the development of hydroelectric power, the irrigation of 212,980 acres of new lands, and the provision of a supplemental water supply for 11,300 acres of land now being served with an inadequate water supply. There is no conflict in the proposed plans of the two agencies for the minor western tributaries subdivision.

NIOBRARA, PLATTE, AND KANSAS RIVERS

14. The plan of development presented in House Document 475, Seventy-eighth Congress, second session, contemplates the construction of 9 reservoirs (of which 4 have been previously authorized) for flood control, irrigation, and other purposes. The lands to be irrigated were not specified in the report and were to be determined by

later detailed investigation. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the construction of 22 reservoirs on various streams in the Niobrara, Platte, and Kansas Rivers subdivision with a total storage capacity of 5,650,400 acre-feet; the reservoirs to be operated for flood control, silt control, the irrigation of 1,284,060 acres of new land, and the provision of a supplemental water supply to 21,804 acres of land now being served with an inadequate water supply. The following substitutions were found to be desirable in the Kansas River Basin:

(*a*) On the south fork of the Republican River, the Bonny Reservoir, in Senate Document 191, was substituted for the Hale Reservoir in House Document 475 to permit the irrigation of approximately 6,500 acres of additional lands. The two reservoir sites are located within 4 miles of each other and for all practicable purposes would provide a comparable degree of flood control.

(*b*) On the Arikoree River the Pioneer Reservoir, in Senate Document 191, was substituted for the Beecher Island Reservoir in House Document 475 inasmuch as the Pioneer Reservoir controlled a larger drainage area, therefore was more advantageous for flood control, and reconnaissance studies by the Bureau of Reclamation indicated that there were no lands suitable for irrigation between the two sites.

(*c*) On Frenchman Creek the Enders Reservoir in House Document 475, was substituted for the Harvey Reservoir in Senate Document 191, because the Enders Reservoir could be built to a greater capacity than the Harvey Reservoir, and would furnish additional flood protection for the Frenchman Creek Valley in Nebraska. Both sites are suitably located to serve all potential irrigation developments.

LOWER MISSOURI BASIN

15. The plan of development as presented in House Document 475 and Senate Document 191 for this sub-

division are identical, therefore no conflict in the engineering features of the two plans exist. The plans include seven reservoirs and a series of levees and appurtenant works along both sides of the Missouri River from the vicinity of Sioux City, Iowa, to the vicinity of the mouth of the Missouri River.

16. Development of the Missouri River Basin in accordance with House Document 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, as coordinated in the enclosed joint engineering report, if authorized as a unified plan, will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation. Precise elevations and heights of reservoirs and dams, and final determinations of the power installations required, can be agreed upon after more detailed plans and cost estimates have been obtained and compared with benefits, and after consideration has been given to the desires and objections of persons affected by the proposed developments.

HARRY W. BASHORE,
Commissioner,
Bureau of Reclamation,
Department of the Interior.

E. REYBOLD,
Major General,
Chief of Engineers, United States Army,
War Department.

WAR DEPARTMENT,
OFFICE OF THE DIVISION ENGINEER,
MISSOURI RIVER DIVISION,
Omaha, Nebr., October 17, 1944.

Subject: Joint report of representatives of Bureau of Reclamation and Corps of Engineers on plans for development of the Missouri River Basin.

To: The Chief of Engineers, United States Army, Washington, D.C., and the Commissioner, Bureau of Reclamation, Department of the Interior, Washington, D.C.

1. In accordance with instructions contained in letter of October 10, 1944, from the Commissioner of Reclamation to Mr. W. G. Sloan, assistant regional director, Bureau of Reclamation, Billings, Mont., and Mr. John Riter, acting director, Branch of Project Planning, Bureau of Reclamation, Denver, Colo., and letter of same date from the Chief of Engineers to the division engineer, Missouri River division, a conference was held in Omaha, Nebr., on October 16-17, 1944, as a result of which the following joint report is submitted.

2. For purposes of discussion, the basin was divided into the following six subdivisions contained in the report of the Bureau of Reclamation, Senate Document No. 191, Seventy-eighth Congress, second session:

(*a*) Upper Missouri River Basin.

(*b*) Yellowstone River Basin.

(*c*) Missouri River—Fort Peck to Sioux City.

(*d*) Minor western tributaries.

(*e*) Niobrara, Platte, and Kansas Rivers.

(*f*) Lower Missouri Basin.

3. It was agreed that there were no points of conflict in the engineering features of the two plans in the following subdivisions:

(*a*) Upper Missouri River Basin.

(*b*) Minor western tributaries.

(*c*) Lower Missouri Basin.

4. It was agreed that the Yellowstone River Basin be developed in accordance with the plans set forth in Senate Document No. 191, Seventy-eighth Congress, second session. With regard to the other two subdivisions all of the engineering features of both plans were agreed upon with the following modifications:

(*a*) Missouri River: Fort Peck to Sioux City.

(1) The Gavins Point Reservoir and the Garrison Reservoir to be developed in accordance with House Document No. 475 Seventy-eighth Congress, second session.

(2) The Fort Randall Reservoir, the Big Bend Reservoir, and the Oahe Reservoir to be developed in accordance with Senate Document No. 191, Seventy-eighth Congress, second session.

(3) The Oak Creek Reservoir, as proposed in House Document No. 475, Seventy-eighth Congress, second session, to be eliminated.

(*b*) Niobara, Platte, and Kansas Rivers: It was agreed to substitute the Bonny and Pioneer Reservoirs, as proposed in Senate Document No. 191, Seventy-eighth Congress, second session, for the Hale and Beecher Island Reservoirs as proposed in House Document No. 475, Seventy-eighth Congress, second session, and to the substitute the Enders Reservoir as proposed in House Document No. 475, Seventy-eighth Congress, second session, for the Harvey Reservoir as proposed in Senate Document No. 191, Seventy-eighth Congress, second session.

R. C. CRAWFORD,
Brigadier General,
United States Army,
Division Engineer.

GAIL A. HATHAWAY,
Head Engineer,
Representing Office of the
Chief of Engineers.

W. G. SLOAN,
Assistant Regional Director,
Bureau of Reclamation,
Billings, Mont.

JOHN R. RITER,
Acting Director, Branch of Project Planning.
Bureau of Reclamation,
Denver, Colo.

APPENDIX D

MISSOURI RIVER BASIN INDUSTRIAL WATER MARKETING

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY RESEARCH AND WATER RESOURCES

OF THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

THE SALE OF WATER FROM THE UPPER MISSOURI RIVER BASIN BY THE FEDERAL GOVERNMENT FOR THE DEVELOPMENT OF ENERGY

July 18, 1975

PART 1

[LOGO]

Printed for the use of the
Committee on Interior and Insular Affairs

U.S. Government Printing Office
Washington : 1975

MISSOURI RIVER BASIN INDUSTRIAL WATER MARKETING

FRIDAY, JULY 18, 1975

U.S. SENATE,
SUBCOMMITTEE ON ENERGY RESEARCH AND WATER RESOURCES, OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m. in room 3110, Dirksen Office Building, Hon. James Abourezk presiding.

Present: Senators Abourezk, Metcalf, and Burdick.

Also present: Russell Brown, professional staff member.

OPENING STATEMENT OF HON. JAMES ABOUREZK, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator ABOUREZK. The hearing will come to order. I would like to welcome Senator Metcalf and Senator Burdick to the subcommittee.

This is the first in a series of open public hearings, whose purpose is to exercise congressional oversight over the sale of water from the Upper Missouri Basin by the Federal Government for energy development.

The push being given Project Independence, a plan proffered by this administration for rapid production of Western coal has put the predominantly argicultural economy of our region on the threshold of massive industrialization.

Despite the growing need by farmers, ranchers and communities in the Northern Plains region, the Federal administration has been moving forward to provide water

for electrical generating plants, coal liquifiction, and coal slurry lines to ship coal to other regions.

In February of this year, an agreement was made between the Departments of Army and Interior known as the "Memorandum of Understanding." This memorandum provides the basis for the two Departments to expedite the use of water for energy development from the main stem of the Upper Missouri River essentially for diversion to the coal fields of Wyoming.

Much protest has arisen from my State of South Dakota since this memorandum was signed. The basic question in my mind is whether this agreement by the two Departments could preempt State water rights particularly since an equitable apportionment has not been reached between the States who are facing their own decisions about water for agriculture and industry.

The water marketing activities by the Department of Interior in the Yellowstone Basin, a major tributary of the Upper Missouri, gives me no encouragement that this question has been answered. However, this question must be answered to the satisfaction of the people of the region most affected and the Nation before we move ahead in our zeal to develop Western energy reserves.

As you know, field hearings by the subcommittees have been scheduled for August 26, in Billings, Mont., and August 28, in Rapid City, S. Dak.

It is my intent to have the record of today's hearing published and distributed prior to those hearings in order to provide the opportunity for State and local government, as well as for individuals, to examine and comment on the Federal agency positions taken today.

Senator Church, who is chairman of this subcommittee, addressed a letter to the Secretary and the Secretary of the Army, in which he posed several questions regarding the memorandum of understanding.

I am placing in the record Senator Church's letter and the departmental response along with a copy of the memorandum.

[The material referred to above follows:]

UNITED STATES SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., June 6, 1975.

Hon. KENT FRIZZELL,
Acting Secretary of the Interior.

Hon. HOWARD B. CALLAWAY,
Secretary of the Army.

GENTLEMEN: This is to inform you that the Energy Research and Water Resources Subcommittee has scheduled a public hearing to examine the February 24, 1975, Memorandum of Understanding to "expedite the use of water for energy development utilizing the waters of the main stem reservoirs of the Corps of Engineers on the Missouri River" between the Secretary of the Interior and the Secretary of the Army.

The initial hearing for the purpose of tāking testimony from Federal witnesses will be held on June 26, 1975, at 10:00 a.m. in Room 3110 of the Dirksen Senate Office Building. Two additional hearings will be held—one in Billings, Montana, on August 26, 1975, and one in Rapid City, South Dakota, on August 28, 1975, in order to take testimony from State and local government and other interested parties.

In order to provide a more complete and useful hearing record, the Departmental witnesses, in their written statements, are requested to address the questions listed below:

1. Who controls, and by what authority, the available supply of water in the Upper Missouri River Basin, including but not limited to, that in the coal fields of the Yellowstone River Subbasin?

2. The Memorandum of Understanding calls for the execution of contracts for the marketing of water from the six main stem reservoirs on the Missouri River. With whom does an applicant for water in the main stem reservoirs file his request? In turn, which Department, Interior or Army, is responsible for signing and administering the contract with the water purchaser? Who has the power and authority to deliver the water when a contract has been signed?

What is the legal authority by which the Department and the Corps enter into contracts for Industrial sales on the Missouri?

3. How much Missouri River water is available for commitment pursuant to the Memorandum of Understanding? How and by whom was this calculation made?

4. Have applications for contracts been filed pursuant to the Memorandum of Understanding with the appropriate Department? If so, how many are pending or have been agreed upon? (Please supply for the record a list of pending applications or contracts including the identity of the reservoir, the quantity of the requested withdrawal, and the identity of the applicant or purchaser with the name and address of the parent company if the applicant is a subsidiary).

5. Are public hearings required prior to approval or disapproval of an applicant's request? If hearings are required, what are the requirement or practices regarding notice of hearings and their location? What opportunities are there for the Indian Tribes, BIA and other concerned agencies to be heard concerning water marketing on the Missouri?

6. What is the role of the respective State during consideration of a water marketing contract and is an opportunity provided for State review and comment on applications? Do the States have a veto authority over a proposed marketing agreement?

7. Is entering into a water marketing contract contingent upon the intended purchaser's possession of a State water right? In each of the States involved, who establishes and administers rights to main stem Missouri River water?

8. How many acre-feet of water are contracted or under option at each reservoir on the main stem? For what purposes—agriculture, industrial, or other—has the water been reserved?

9. Is either Department aware of situations whereby municipal or industrial options for water are precluding other area uses such as irrigation? If so, where?

10. Has either Department formulated a policy of reserving available water on the main stem for future uses, thereby discouraging present demands or other potential uses?

11. What is the nature and status of pending litigation to adjudicate Indian water rights in the Missouri Basin? Please provide for the record a list of pending litigation involving Federal agencies.

12. Have you established procedures for evaluating and choosing among conflicting uses of Missouri Basin water? If so, what are they?

13. What priority do you assign to development of additional generating capacity at existing dams on the main stem of the Missouri? Do you foresee any reduction in hydropower potential, or any further delays in its development, because of industrial water sales?

14. In order to evaluate the potential demand for agricultural water in the Missouri River Basin, list projects (including potential demands) for which:

a. Feasibility level studies are underway (with the projected study completion date);

b. Feasibility studies have been completed (identifying those projects found feasible);

c. Feasibility studies are proposed.

15. List also those projects which have been authorized and the respective stage of completion.

In accordance with the Committee rules, please provide 100 copies of your agency's testimony no later than June 24. They should be delivered to Russell Brown, professional staff member, in Room 3106 Dirksen Senate Office Building.

I would appreciate your informing the Committee who will testify at the June 26 hearing.

With best wishes.

Sincerely,

FRANK CHURCH,
Chairman, Subcommittee on Energy
Research and Water Resources.

ANSWERS TO QUESTIONS ASKED BY SENATOR FRANK CHURCH, CHAIRMAN OF THE SUBCOMMITTEE ON ENERGY RESEARCH AND WATER RESOURCES OF THE SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS IN HIS LETTER DATED JUNE 6, 1975, TO THE ACTING SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY CONCERNING THE MEMORANDUM OF UNDERSTANDING BETWEEN THE RESPECTIVE SECRETARIES

1. *Question.* Who controls, and by what authority, the available supply of water in the Upper Missouri River Basin, including but not limited to, that in the coal fields of the Yellowstone River Subbasin?

Answer. Each of the States along the main stem of the Missouri River and the Federal Government have an interest in, and management responsibilities for, the available water supply from the river. The States have authority to grant permits for the use of the natural flow taken from the river. The right of the Federal Government to control the use of water in its reservoirs is based upon the legislation authorizing the construction and

operation of the reservoirs and upon Federal jurisdiction over navigable waterways.

Congressional authorization in 1944 of the Missouri River Basin Project, now identified as the Pick-Sloan Missouri Basin Program, placed certain Federal responsibilities over water uses on the Missouri River. That legislation clearly specified that the Corps of Engineers would be responsible for building the dams and for operating and regulating the reservoirs for flood control and navigation. The Bureau of Reclamation was designated to market the power generated at the mainstem reservoir hydroelectric generating stations. The Bureau also received authority to develop irrigation projects with the use of water from the mainstem reservoirs.

Power revenues are to be credited to a basin account which repays, with interest, the costs of the generating facilities; and surplus power revenues are to be used to repay the costs of irrigation which are beyond the water users' ability to repay. Therefore, regulation of the water for repayment of the reimbursable project costs, and regulation to serve the public interests for flood control, navigation, recreation, and other nonreimbursable functions are Federal responsibilities.

The hydrology of the main stem of the Missouri River is well enough known to conclude there is not enough natural flow in the Missouri River to meet existing and prospective uses during a portion of some years. Thus, reliance must be placed on the regulated flows for the six mainstem Federal reservoirs to supplement natural flow so that long-term commitments for water use can be made. Even when natural flow is available, consideration must be given to authorized Federal functions, including navigation, flood control, power, and other purposes.

A cooperative program between the States and the Federal Government for marketing industrial water will per-

mit an optimum use of the natural flow and regulated flow. A Federal-State cooperative water marketing program will mutually benefit the State and Federal interests involved and will enable each to exercise its respective rights and authorities without the need to quantify flows.

The procedures for marketing that are described in this and other answers to your questions apply only to waters which it will be determined, after full consideration of Indian water rights, are available for marketing independent of those rights. No procedures have yet been established for satisfying Indian water rights out of the main stem of the Missouri River.

2. *Question.* The Memorandum of Understanding calls for the execution of contracts for the marketing of water from the six mainstem reservoirs of the Missouri River. With whom does an applicant for water in the mainstem reservoirs file his request? In turn, which Department, Interior or Army, is responsible for signing and administering the contract with the water purchaser? Who has the power and authority to deliver the water when a contract has been signed? What is the legal authority by which the Department and Corps enters into contracts for industrial sales on the Missouri?

Question. With whom does an applicant for water in the mainstem reservoirs file his request?

Answer. The Upper Missouri Region of the Bureau of Reclamation in Billings, Montana, will administer the Federal aspects of the water marketing program. All applications filed with the Corps of Engineers in Omaha, Nebraska, or directly with the two Departments have been referred to the Bureau of Reclamation. However, the Department has extended the first option to the States to contract directly with the applicant. If that option is elected, the State itself would administer the contract.

In either case the water user will be expected to make application to the appropriate State for necessary water permits.

Question. In turn, which Department, Interior or Army, is responsible for signing and administering the contract with the water purchaser?

Answer. In accordance with the Memorandum of Understanding, the proposed contract terms and conditions must be satisfactory to the Secretary of the Army and the Secretary of the Interior. The Secretary of the Interior, through the Bureau of Reclamation, would execute and administer the contracts, if the appropriate State declined the option to contract.

Question. Who has the power and the authority to deliver the water when a contract has been signed?

Answer. Once State approval had been acquired, the water would be delivered pursuant to the terms of the contract and applicable State laws including those relating to State water use. The diversion and conveyance of water by the contractor would be at the contractor's expense and at locations approved by the Corps of Engineers and the Bureau of Reclamation. The contract would include water use schedules so that the Corps of Engineers could accomplish regulation and reservoir releases for the contractor's diversions, taking into account the contemporary and long-term hydrologic conditions of the river system.

Question. What is the legal authority by which the Department and Corps enters into contracts for industrial sales on the Missouri?

Answer. The legal authority for the Bureau of Reclamation's execution of water service contracts for municipal and industrial uses, under the Pick-Sloan Missouri Basin Program, is provided by section 9(c) of the Flood Control Act of December 22, 1944 (58 Stat. 887).

The water service contracts would be written pursuant to section 9(c) of the Reclamation Project Act of 1939 (53 Stat. 1187), as part of the reference to Reclamation Law contained in the 1944 Flood Control Act which authorized the Corps of Engineers to construct the mainstem storage reservoirs on the Missouri River. The Secretaries of the Army and Interior were provided full discretionary authority for management of the water resources to protect the operational and financial integrity of the Pick-Sloan Missouri Basin Program.

3. *Question.* How much Missouri River water is available for commitment pursuant to the Memorandum of Understanding? How and by whom was this calculation made?

Answer. The Memorandum of Understanding limits temporary industrial water availability to a quantity within the amount destined for eventual agricultural use. Projected water uses within the Missouri River Basin were authorized in the 1944 Flood Control Act. Quantification on the expected uses, the resulting depletions, and effects of the authorized plan were reported in April 1951 by a Subcommittee on Adequacy of Flows in the Missouri River Basin pursuant to a resolution of the Missouri Basin Inter-agency Committee (MBIAC).

Membership of the MBIAC in April 1951 consisted of the Governors of Nebraska, Missouri, Montana, South Dakota, and North Dakota and regional administrators from the Department of Agriculture, the Federal Power Commission, the Corps of Engineers, the Department of Commerce, and the Department of the Interior. The committee's resolution stipulated that—"such subcommittee shall consist of a representation from the U.S. Weather Bureau, the U.S. Geological Survey, the U.S. Public Health Service, the Federal Power Commission, the Bureau of Reclamation, the Department of Agriculture, and the Corps of Engineers; and that the State governments

be represented on the subcommittee by two State engineers, one from the Upper Basin and one from the Lower Basin."

Anticipated total future depletions were projected beyond 1949, and historic streamflow conditions were modified to 1949 levels of development. At that time, the streamflow and projected program depletions were:

UPPER BASIN ABOVE SIOUX CITY, IOWA,
ACRE-FEET ANNUALLY

Year	Average streamflow adjusted to 1949 level	Projected depletions authorized and anticipated
1949	24,593,000	0
1960		2,307,000
1970		4,539,000
1980		6,648,000
1990		8,461,000
2000		8,461,000

Of the projected depletions, most were associated with the 3,648,952 acres of new land irrigation and 490,468 acres of land requiring supplemental irrigation supplies under Bureau of Reclamation plans.

The projections have been modified and scheduling altered in the Missouri River Basin Framework Plan published in 1971. This study was similarly sponsored by the Missouri River Basin Inter-Agency Committee but included all 10 Missouri Basin States and 10 Federal agencies. The objective, however, is unchanged and demonstrates that considerable water intended for ultimate irrigation use could be used for energy-related purposes.

Using the Framework Plan, Corps of Engineers operation studies, and Bureau of Reclamation Rate and Repayment Studies, the Bureau of Reclamation determined in what quantities and during what time frame waters allotted to future irrigation use could be committed to interim nonirrigation users. Reclamation studies show that

up to 2 million acre-foot of mainstem reservoir storage will not be utilized for agricultural purposes before the year 2023. Of this available supply, we are proposing that 1 million acre-feet annually could be considered as available initially for the interim industrial water marketing program. This determination has been a joint endeavor by the Departments of the Interior and the Army, and it has been discussed with officials of the Upper Missouri River Basin States.

The industrial water availability study is based on the assumption that flow levels in the stream will be maintained at a minimum of 6,000 cubic feet per second to ensure water availability in the channel at all times. This can be accomplished best if the natural flow is not assumed to be available for claims by one State in preference to another. To meet the demands for possible industrial water throughout the hydrological cycle, the natural flow would require augmentation by stored water during critical periods at specific locations. In order to avoid prolonged controversy over respective water rights and to avoid fragmentation of water rights to respective State claims, it was concluded that natural flows and storage can be most effectively marketed on a cooperative Federal-State basis as one account. The 10 Governors of the Missouri River Basin States were advised of this intention by letter, dated March 25, 1975, from Assistant Secretary Jack O. Horton, and a first-option offer was given for the interested States to purchase a supply of water from the federally regulated reservoirs.

4. *Question.* Have applications for contracts been filed pursuant to the Memorandum of Understanding with the appropriate Department? If so, how many are pending or have been agreed upon? (Please supply for the record a list of pending applications or contracts including the identity of the reservoir, the quantity of the requested withdrawal, and the identity of the applicant or purchaser with the name and address of the parent company if the applicant is a subsidiary).

Answer. The Bureau of Reclamation has received some applications pursuant to the Memorandum of Understanding. To date, no contracts have been executed. There are 12 expressions of interest to the Corps of Engineers and 10 requests have been received by the Bureau of Reclamation regional office in Billings, Montana. Most of the inquiries on availability of water predate the February 24, 1975, Memorandum of Understanding and, therefore, each request will need to be reviewed. The requests received by the respective offices are shown in the attached tabulations. The expressions of interest pertain to 1,007,000 acre-feet annually when adjusted for the apparent duplication of the Energy Transportation System, Inc., request for 75,000 acre-feet from Oahe Reservoir. Further duplication of requests will be sorted out in the contracting and marketing processes established in accordance with the Memorandum of Understanding.

The water quantities requested by each contract will be reviewed carefully from a water use-efficiency standpoint as it relates to the proposed industrial undertaking. They would also undergo thorough environmental analysis and close Federal-State discussion. The proposed contracts will carry anti-speculation provisions. As stated earlier, 2 million acre-feet annually are considered available for the industrial purposes, although we believe this amount could and should permit other uses if the demand would be forthcoming.

5. *Question.* Are public hearings required prior to approval or disapproval of an applicant's request? If hearings are required, what are the requirements or practices regarding notice of hearings and their location? What opportunities are there for the Indian tribes, BIA, and other concerned agencies to be heard concerning water marketing on the Missouri?

Answer. Public hearings are not specifically required as a preliminary to the negotiation of water service contracts. The approval process of the Department of the

Interior, however, provides opportunity for participation by Indian interests and the Bureau of Indian Affairs. Public hearings are also an integral part of the NEPA process and would also be held as a matter of course if requested by the appropriate State.

Paragraphs 3b and 4 of the Memorandum of Understanding assign to the Department of the Interior responsibility for compliance with the National Environmental Policy Act of 1969 (NEPA). This will require environmental assessments and the preparation of environmental impact statements which would be filed with the Council on Environmental Quality for public review and comment.

Departmental regulations pursuant to NEPA provide for discretionary public hearings to solicit the views of interested parties. Notice of such hearings includes publication of the *Federal Register* at least 30 days before the hearing date.

In addition, and early on in the marketing program, the Department of the Interior will arrange to obtain the views of the Bureau of Indian Affairs and the Indian tribes in regarding to the water market opportunities. As a trustee of American Indian natural resources, the Department will give careful consideration to the *Winters* rights of the affected tribes during the implementation of this Memorandum of Understanding. (*Winters* v. *United States*, 207 U.S. 564 (1908)).

6. *Question.* What is the role of the respective State during consideration of a water marketing contract and is an opportunity provided for State review and comment on applications? Do the States have a veto authority over a proposed marketing agreement?

Answer. As discussed in our response to questions 1, 2, and 3, the marketing arrangements call for joint effort and mutual involvement with the States throughout contract negotiations. The States would have the first right to contract for water from the mainstem reservoirs. The

State could then subcontract with potential water users. If any State chooses not to contract for water, the desirability of the Federal Government contracting directly with potential water users will be reviewed with appropriate State officials, taking into account the State's decision not to participate in the marketing program. Given the State's inherent jurisdiction over State lands, State water uses, and rights-of-way, it would be both unlikely and undesirable for any application to proceed without State approval.

7. *Question.* Is entering into a water marketing contract contingent upon the intended purchaser's possession of a State water right? In each of the States involved, who establishes and administers rights to mainstem Missouri River water?

Answer. The right of the Federal Government to control water within its own reservoirs and on navigable rivers is based on the legislation which authorized construction and operation of the reservoirs or the control of navigable waterways. *Dugan* v. *Rank*, 372 U.S. 609, 623 (1963); *Turner* v. *Kings River Conservation Dist.*, 360 F. 2d 184, 198 (9th Cir. 1966); *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224-225 (1955); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

Our contracting principles will require that water users obtain from the Corps of Engineers the necessary permits or licenses to place diversion facilities on Federal property, and contractors will be expected to comply with all applicable State laws.

State water right laws in the Missouri River Basin indicate generally who may control waters. Waters which are captured within a reservoir, pursuant to a State water right, are normally controlled by the owner of the reservoir. The right of the Federal Government to control water within its own reservoirs may, therefore, be based on a State water right.

a. In Montana, a water right may be perfected by following the statutory procedures set out in MONT. REV. CODE 89-808-812 (1947); or by the construction of diversion or impoundment works, followed by the application of captured water to beneficial use. *Bailey* v. *Tintinger*, 45 Mont. 154, 122 P. 575 581 (1912). The statutory procedure has been followed on all Bureau of Reclamation projects except the Canyon Ferry Unit. On the Canyon Ferry Unit and on the Fort Peck Project of the Corps of Engineers, the alternate procedure recognized by *Bailey* was followed.

b. In North Dakota, the United States filed and had approved a water right application for 3,145,000 acre-feet of the waters of the Missouri, Souris, Sheyenne and James Rivers for use in connection with the Garrison Diversion Unit. The Bureau has also complied with the State water right laws in connection with the control and use of waters on other congressionally authorized reclamation projects in the State of North Dakota.

c. In South Dakota, section 61.0106 of the South Dakota Code, as amended in 1955, validates all vested rights which are defined in section 61.0102(7)(c) as "The right to take and use water for beneficial purposes where a riparian owner is engaged in the construction of works for the actual application of water to a beneficial use at the time of the passage of this chapter (March 2, 1955), provided such works shall be completed and water is actually applied for such use within a reasonable time thereafter." On March 2, 1955, the United States was a principal riparian owner on the Missouri River and the mainstem reservoirs of the Missour River Basin Project, with their appurtenant power generating facilities, were under construction, so that the Government's right to the use of the Missouri River waters now enjoys State validation.

8. *Question.* How many acre-feet of water are contracted or under option at each reservoir of the main stem? For what purposes—agriculture, industrial, and other—has the water been reserved?

Answer. Contracts for mainstem water have been signed on three units of the Pick-Sloan Missouri Basin Program. The Fort Clark Unit, with headquarters in Stanton, North Dakota, contains 1,929 irrigable acres. About 2,200 acre-feet of water are diverted annually. Construction is underway on the initial stages of the multipurpose Garrison Diversion and Oahe Units. Water use on these units will be for irrigation, municipal and industrial, fish and wildlife, and recreation. The water supply for the initial stage Garrison Diversion Unit in North Dakota will be pumped from Lake Sakakawea and will total about 871,000 acre-feet of water per year. The initial stage Oahe Unit in South Dakota will draw about 444,000 acre-feet from the Oahe Reservoir.

9. *Question.* Is either Department aware of situations whereby municipal or industrial options for water are precluding other area uses such as irrigation? If so, where?

Answer. No.

10. *Question.* Has either Department formulated a policy of reserving available water on the main stem for future uses, thereby discouraging present demands or other potential uses?

Answer. Only to the extent authorized by the Flood Control Act of 1944 establishing the Missouri River Basin Project, now the Pick-Sloan Missouri Basin Program. Reservations have been made for future irrigation units of the Pick-Sloan Missouri Basin Program. The industrial water availability study discussed earlier fully recognizes existing uses of water for legitimate diversions and those uses approved and authorized by the Congress.

11. *Question.* What is the nature and status of pending litigation to adjudicate Indian water rights in the Missouri Basin? Please provide for the record a list of pending litigation involving Federal agencies.

Answer. We are not aware of any pending litigation to adjudicate Indian water rights in the portion of the

Basin covered by the Memorandum of Understanding—the main stem of the Missouri River.

12. *Question.* Have you established procedures for evaluating and choosing among conflicting uses of Missouri Basin water? If so, what are they?

Answer. The O'Mahoney-Millikin Amendment to the Flood Control Act of 1944 (58 Stat. 887; 33 U.S.C. 701-1 (b)) provides that, west of the 98th meridian, the use of water for navigation shall be only such as does not conflict with any beneficial use for domestic, municipal, stock water, irrigation, mining, or industrial purposes. Current projections of water use indicate that there should not be any conflict among consumptive water users served from the mainstem reservoirs.

13. *Question.* What priority do you assign to development of additional generating capacity at existing dams on the main stem of the Missouri? Do you foresee any reduction in hydropower potential, or any further delays in its development because of industrial water sales?

Answer. We consider hydropower as having high priority. We believe that the interim water marketing quantity of 1 million acre-feet, which is about 5 percent of the historical flows at Sioux City, Iowa, is insignificant from the standpoint of evaluating additional generating capacity at existing dams on the main stem of the Missouri River. We see no reduction in hydropower peaking potential nor any delay for the development of needed hydropeaking capability because of the industrial water marketing program.

It is our understanding that all planned additions of generating capacity at the existing dams on the main stem of the Missouri would be peaking power. There would be little or no increased energy production from the addition of this generating capacity.

14. *Question.* In order to evaluate the potential demand for agricultural water in the Missouri River Basin, list projects (including potential demands) for which:

Qa. Feasibility level studies are underway (with the projected study completion date):

Qb. Feasibility studies have been completed (identifying those projects found feasible):

Ab.

[Table Omitted in Printing]

Qc. Feasibility studies are proposed or are being reappraised for the following units which involve diversions of water from the mainstream reservoirs.

Ac.

[Table Omitted in Printing]

15. *Question.* List also those projects which have been authorized and the respective stage of completion.

Answer. Authorized units under construction for irrigation purposes within the Upper Basin are those shown in 14Ab. Of those, Garrison Diversion Unit has been under construction since 1968, and first deliveries of water are expected in 1978, with completion of service facilities in 1987. Oahe Unit construction has barely started, and first water deliveries are scheduled for 1982. Completion is expected in 1994.

Enclosure.

INDUSTRIAL WATER REQUESTS RECEIVED BY BUREAU OF RECLAMATION JUNE 18, 1975 *

Company	Acre-feet requested	Purpose
Consolidation Coal Co.	50,000	Industrial.
Sun Oil Co.[1]	50,000	Gasification.
John S. Wald	50,000	Industrial.
Mobil Oil Corp.	50,000	Unspecified.
Getty Oil Co.	50,000	Mineral development.
Mobil Oil Corp.	50,000	Unspecified.
Wesco Resources	60,000	Power generation coal gasification.
Phillips Petroleum Co.	50,000	Industrial.
Energy Transportation Systems, Inc.	75,000	Coal slurry.
American Natural Gas Service Co.[2]	68,000	Gasification.
Total (Fort Peck, 360,000, Sakakawea, 118,000; Oahe, 75,000).	553,000	

* Company address, date of request and lake omitted in printing.

[1] Request from HFC Co., Inc., which was acquired by Sun Oil Co.

[2] Application under name of Michigan Wisconsin Pipe Line Co., recent correspondence also includes the name "ANG Coal Gasification Co."

INDUSTRIAL WATER REQUESTS RECEIVED BY CORPS OF ENGINEERS, JUNE 15, 1975 *

Company	Acre-feet resquested	Purpose
Energy Transportation Systems, Inc...	75,000	Coal slurry.
NRG Co.	50,000	Coal development.
Tenneco Coal	50,000	Unspecified.
Basin-Electric Power Cooperative.	9,000	Powerplant cooling.
Potashnick Construction, Inc.	50,000	Coal development.
Kansas-Nebraska Natural Gas Co., Inc.	25,000	Coal gasification.
I. H. Garms & Sons Co.	50,000	Coal development.
Chevron Oil Co.	50,000	Do.
Dreyer Bros. Co.[3]	97,000	Do.[4]
Gulf Mineral Resources Co.	50,000	Unspecified.
Shell Oil Co.	[5]	Coal development.
Chevron Oil Co.	23,000	Power generation, coal gasification.
Total (Fort Peck, 372,000; Sakakawea, 32,000; Oahe, 125,000).	529,000	

* Company address, date of request and lake omitted in printing.

[1] Sept. 1, 1974 rights transferred to intake Water Co.

[2] Subsidy of Burlington Northern.

[3] Attorneys for Dreyer Bros. Co.

[4] June 27, 1974 water right application was for only 67,000 acre-feet, 35,000 for irrigation, 9,000 for production of ammonia, 8,000 for methanol-methyl fuel, and 15,000 for synthetic diesel fuel.

[5] Unspecified.

* * *

Supreme Court, U.S.
FILED
MAY 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-939 and 86-941

In the Supreme Court of the United States

OCTOBER TERM, 1986

ETSI PIPELINE PROJECT, PETITIONER

v.

STATE OF MISSOURI, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

CHARLES FRIED
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

RALPH W. TARR
Solicitor

LOUIS D. MAURO
Senior Attorney
Department of the Interior
Washington, D.C. 20240

SUSAN J. CRAWFORD
General Counsel
Department of the Army
Washington, D.C. 20310

FRED R. DISHEROON
KATHLEEN P. DEWEY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Secretary of the Interior may enter into a contract, pursuant to the federal reclamation laws, to supply unutilized irrigation water from a Missouri River mainstem reservoir for industrial use.

PARTIES TO THE PROCEEDING

A full list of the parties to this proceeding is set out in the government's petition for a writ of certiorari. See Fed. Pet. II.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	2
A. The formulation of the Pick-Sloan Plan	3
B. The problem of unutilized irrigation water	15
C. The present controversy	17
Introduction and summary of argument	20
Argument:	
The Secretary of the Interior may enter into contracts, pursuant to the federal reclamation laws, to supply unutilized irrigation water from Missouri River mainstem reservoirs for industrial use	23
I. Congress, in approving the Pick-Sloan Plan, authorized the Secretary of the Interior to administer the reclamation aspects of mainstem reservoirs, including disposition of water stored, but not presently needed, for irrigation use	23
A. Section 9(a) of the Flood Control Act	24
B. Section 9(c) of the Flood Control Act	29
II. The Secretary's interpretation of Section 9 of the Flood Control Act is consistent with the stated objectives of Congress and the overall plan for administration of the Pick-Sloan program	34
A. The objectives of Congress	34
B. The administration of the Pick-Sloan facilities	40
III. The Secretary of the Interior's interpretation of Section 9 of the Flood Control Act is entitled to deference from the courts	44
Conclusion	50
Addendum	1a

TABLE OF AUTHORITIES

Cases: Page

Adams v. *United States*, 319 U.S. 312 (1943) 46
American Tobacco Co. v. *Patterson*, 456 U.S. 63 (1982) 23
Bulova Watch Co. v. *United States*, 365 U.S. 753 (1961) 29
California v. *United States*, 438 U.S. 645 (1978) 39
CFTC v. *Schor*, No. 85-621 (July 7, 1986) 49
Chemehuevi Tribe v. *FPC*, 420 U.S. 395 (1975) 49
Chemical Manufacturers Ass'n v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985) 45
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 45
Clarke v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987) 45
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 23
Environmental Defense Fund, Inc. v. *Andrus*, 596 F.2d 848 (9th Cir. 1979), aff'g in part *Environmental Defense Fund, Inc.* v. *Morton*, 420 F. Supp. 1037 (D. Mont. 1976) 30
Escondido Mutual Water Co. v. *La Jolla Indians*, 466 U.S. 765 (1984) 48
FDIC v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986) 23, 45, 49
Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985) 23
Fourco Glass Co. v. *Transmirra Products Corp.*, 353 U.S. 222 (1957) 29
Haig v. *Agee*, 453 U.S. 280 (1981) 49
Hillsborough County v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) 45
INS v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987) 33
Japan Whaling Ass'n v. *American Cetacean Society*, No. 85-954 (June 30, 1986) 45, 50
Kelly v. *Robinson*, No. 85-1033 (Nov. 12, 1986) 34
Kepner v. *United States*, 195 U.S. 100 (1904) 29
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956) 34

Cases—Continued: Page

Miller v. *Youakim*, 440 U.S. 125 (1979) 46
Missouri v. *Ross*, 299 U.S. 72 (1936) 29
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) .. 49
Offshore Logistics, Inc. v. *Tallentire*, No. 85-202 (June 23, 1986) 34
Pilot Life Insurance Co. v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987) 34
Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 29
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 49
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 23
South Dakota v. *Nebraska*, No. 103, Orig. (Mar. 31, 1986) 19
Udall v. *Tallman*, 380 U.S. 1 (1965) 47
United States v. *American Trucking Ass'ns*, 310 U.S. 534 (1940) 46
United States v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986) 43, 45-46
United States v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113 (1850) 34
United States v. *James*, No. 85-434 (July 2, 1986) .. 23
United States v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985) 45, 49-50
United States v. *Rutherford*, 442 U.S. 544 (1979) .. 49
United States v. *Sponenbarger*, 308 U.S. 256 (1939) 46
United States v. *Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977) 28, 31
United States v. *Yermian*, 468 U.S. 63 (1984) 23
United States ex rel. Chapman v. *FPC*, 345 U.S. 153 (1953) 24
Young v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986) 45, 49, 50
Zenith Radio Corp. v. *United States*, 437 U.S. 443 (1978) 47
Act of May 2, 1956, ch. 231, 70 Stat. 126 29

Statutes and regulation: Page

Act of Aug. 14, 1964, Pub. L. No. 88-442, 78 Stat. 446 15
Act of Aug. 3, 1968, Pub. L. No. 90-453, 82 Stat. 624 16
Department of Energy Organization Act § 302(a)(1)(E), 42 U.S.C. 7152(a)(1)(E) 43
Flood Control Act of 1928, ch. 569, 45 Stat. 534 46
§ 10, 45 Stat. 538 4
Flood Control Act of 1938, ch. 795, § 4, 52 Stat. 1218 4
Flood Control Act of 1944, ch. 665, 58 Stat. 887 ..... 2, 30, 45
§ 1, 58 Stat. 888 12
§ 1(a), 58 Stat. 888 13
§ 1(b), 58 Stat. 889 ..... 13, 36, 40
§ 1(c), 58 Stat. 889 13
§ 5, 58 Stat. 890 45
§ 6, 58 Stat. 890 ..... 11, 13, 26, 38, 39, 40, 44, 47
§ 8, 58 Stat. 891 ..... 11, 13, 26, 28, 31, 48
§ 9, 58 Stat. 891 ..... *passim*
§ 9(a), 58 Stat. 891 ..... 13, 21, 23, 24, 28, 29, 30, 31, 1a
§ 9(b), 58 Stat. 891 ..... 13, 14, 30, 33, 1a
§ 9(c), 58 Stat. 891 ..... *passim*
§ 9(d), 58 Stat. 891 ..... 14, 33, 1a
§ 9(e), 58 Stat. 891 ..... 14, 33, 2a
§ 10, 58 Stat. 891 31
Reclamation Act of 1902, ch. 1093, 32 Stat. 388:
§ 2, 32 Stat. 388 (43 U.S.C. 411) 4
§ 8, 32 Stat. 390 (43 U.S.C. 383) 39
Reclamation Project Act of 1939, 43 U.S.C. 485 *et seq.*:
§ 9, 43 U.S.C. 485h 4, 7, 42
§ 9(c), 43 U.S.C. 485h(c) 2, 3, 16, 19, 21, 24, 30, 2a-3a
Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, 96 Stat. 1263-1274 48
§ 212(b), 96 Stat. 1269 (43 U.S.C. 390*ll*(b)) 48
Rivers and Harbors Act of 1912, ch. 253, § 1, 37 Stat. 219 4

Statutes and regulation—Continued: Page

Rivers and Harbors Act of 1917, ch. 49, § 1, 40 Stat. 259 4
Rivers and Harbors Act of 1925, ch. 467, § 1, 43 Stat. 1188 4
Rivers and Harbors Act of 1927, ch. 47, 44 Stat. 1010:
§ 1, 44 Stat. 1013 4
§ 4, 44 Stat. 1020 4
Rivers and Harbors Act of 1935, ch. 831, § 1, 49 Stat. 1034 4
WEB Rural Water Development Project Act of 1982, Pub. L. No. 97-273, 96 Stat. 1181:
§ 3(a), 96 Stat. 1181 16
§ 4, 96 Stat. 1182 16
Army Project Purpose Planning Guidance Reg. 1105-2-20 (Jan. 29, 1982) 38-39

Miscellaneous:

Bureau of Reclamation, U.S. Dep't of the Interior, *Final Environmental Impact Statement: Water for Energy—Missouri River Reservoirs* (1977) .. 16
90 Cong. Rec. (1944):
pp. 2835-2846 10
p. 4119 9
p. 4123 8
p. 4125 8
pp. 4125-4127 8
p. 4126 ..... 8, 26, 33
p. 4127 33
p. 4130 ..... 8, 33
p. 4131 4
p. 4132 35
p. 4133 ..... 9, 35
pp. 4133-4134 8
p. 4134 ..... 8, 26, 33, 38, 40
p. 4139 8
p. 4140 ..... 8, 9, 40
pp. 4140-4142 8

Miscellaneous—Continued: Page

p. 4141 ..... 8, 9, 26
p. 4142 9
pp. 4143-4147 9
p. 4147 ..... 26, 34
p. 4197 8
p. 4202 31
pp. 4207-4208 8
p. 4212 9
pp. 4212-4218 8
p. 4214 ..... 9, 35
p. 4217 9
p. 4218 ..... 9, 35
pp. 4222-4224 6
pp. 4223-4224 9
p. 4224 35
p. 4228 8
p. 4232 9
pp. 8227-8228 24
p. 8315 40
p. 8375 28
p. 8376 36
pp. 8421-8425 14
pp. 8485-8493 13
p. 8489 27
p. 8544 36
pp. 8546-8548 13
p. 8547 36
p. 8549 42
p. 8551 13
pp. 8551-8553 13
pp. 8552-8553 13
p. 8553 ..... 13, 28, 30
p. 8564 24
p. 8617 40
p. 8623 27
p. 8625 34
p. 8626 34
pp. 9259-9269 15
pp. 9277-9287 14
p. 9284 ..... 32, 36

Miscellaneous—Continued: Page

128 Cong. Rec. (1982):
p. 16607 48
p. 16609 42
p. 16611 48
Control and Use of the Water Resources of the Missouri River Basin: Hearings on S. 1915 Before a Subcomm. of the Senate Comm. on Irrigation and Reclamation, 78th Cong., 2d Sess. (1944) 7, 42
Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944) 9, 10, 11, 24, 25, 42, 43, 47, 48
Flood Control Plans and New Projects: Hearings on H.R. 4485 Before the House Comm. on Flood Control, 78th Cong., 1st Sess. (1944) 4, 6, 24, 25
Guhin, *The Law of the Missouri*, 30 S.D. L. Rev. 347 (1985) 3, 5, 7, 10, 15, 16, 42, 43
H.R. 3961, 78th Cong., 2d Sess. (1944) 9, 10
H.R. 4485, 78th Cong., 2d Sess. (1944) 7, 8, 9, 10, 11, 12, 14, 28
H.R. Conf. Rep. 2051, 78th Cong., 2d Sess. (1944).. 14, 32
H.R. Doc. 238, 73d Cong., 2d Sess. (1934) 4
H.R. Doc. 475, 78th Cong., 2d Sess. (1944) 5, 6, 12, 24, 25, 29, 40
H.R. Rep. 1000, 78th Cong., 2d Sess. (1944) 9
H.R. Rep. 1309, 78th Cong., 2d Sess. (1944) 6, 26, 31, 35
Memorandum from Richard V. Kearney, Office of the Gen. Coun., Dep't of the Army, to the Chief, Office of Civil Functions (Dec. 16, 1974) 16
Memorandum from Susan J. Crawford, Gen. Coun., Dep't of the Army, to the Assistant Secretary of the Army (Civil Works), *Proposed Contracts for Municipal and Industrial Water Withdrawals from Mainstem Reservoirs* (Mar. 13, 1986) 39
Memorandum from the Solicitor to the Secretary of the Interior (Nov. 27, 1974) 16

Miscellaneous—Continued: Page

Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works, 85th Cong., 1st Sess. Pt. 1 (1957) 27-28, 41, 43, 44

Missouri River Basin—Conservation, Control, and Use of Water Resources Including Floodwaters: Hearings on H.R. 4795 Before the House Comm. on Irrigation and Reclamation, 78th Cong., 2d Sess. (1944) 7

Missouri River Basin: Hearings on H.R. 3961 Before the House Comm. on Rivers and Harbors, 78th Cong., 2d Sess. (1944) 9-10

Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. (1975) 17, 18, 49

M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan: A Case Study in Congressional Policy Determination* (1955) 3, 4, 5, 7, 10

River and Harbor Bill: Hearings on H.R. 3961 Before the House Comm. on Rivers and Harbors, 78th Cong., 2d Sess. (1944) 9

Rivers and Harbors Omnibus Bill, Missouri River Project, et al.: Hearing on H.R. 3961 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944) 10

J. Sax, *Federal Reclamation Law* in 2 *Waters and Water Rights* (R. Clark ed. 1967) 42

S. Doc. 191, 78th Cong., 2d Sess. (1944) 7, 12, 15, 26, 27, 37, 40, 41, 42, 43

S. 247, 78th Cong., 2d Sess. (1944) 12, 15, 28, 29, 37, 41

S. Rep. 1030, 78th Cong., 2d Sess. (1944) 11

S. Rep. 1066, 84th Cong., 1st Sess. (1955) 29, 49

U.S. Army Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual* (1979) 41, 42

Webster's New International Dictionary (3d ed. 1976) 32-33

Miscellaneous—Continued: Page

Western Area Power Administration (Pick-Sloan Project); Order Confirming and Approving Rate Schedules, Noting Interventions, and Denying Request for Hearing, 49 Fed. Reg. 6986 (1984) .. 42, 43, 44

Western Area Power Administration Pick-Sloan Missouri Basin Program; Submission of Rate Order, 47 Fed. Reg. 31738 (1982) 43, 44

Western Power Administration, *Pick-Sloan Missouri Basin Program Power Rate Adjustment Customer Brochure* (June 1984) 44

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-939

ETSI PIPELINE PROJECT, PETITIONER

v.

STATE OF MISSOURI, ET AL.

No. 86-941

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a)[1] is reported at 787 F.2d 270. The opinion of the district court (Pet. App. 45a-72a) is reported at 586 F. Supp. 1268.

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in this case by the private petitioner, ETSI Pipeline Project (No. 86-939).

JURISDICTION

The judgment of the court of appeals (Pet. App. 73a) was entered on March 13, 1986. Petitions for rehearing were denied on July 10, 1986 (Pet. App. 74a-75a). On September 26, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including December 7, 1986 (a Sunday), and the petitions were filed on December 8, 1986. This Court granted the petitions for a writ of certiorari on March 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 9 of the Flood Control Act of 1944, ch. 665, 58 Stat. 891, and Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), are set out in the Addendum to this brief.

STATEMENT

Near the close of World War II, Congress enacted an omnibus flood control bill authorizing a wide range of water resource programs to protect the nation from devastating floods and to promote the post-war domestic economy. See Flood Control Act of 1944 (FCA), ch. 665, 58 Stat. 887 (partially codified in scattered sections of Titles 16, 33, and 43 U.S.C.). Congress specifically approved the Pick-Sloan Plan, a comprehensive multiple-purpose development program for the Missouri River Basin. FCA § 9, 58 Stat. 891. This massive program, which is jointly administered by the Secretary of the Army and the Secretary of the Interior, provides flood control, navigation, reclamation, and hydropower benefits for the midwestern United States. It includes numerous mainstem and tributary reservoirs that are intended, among other purposes, to conserve water for irrigation use. The anticipated irrigation needs, however, have not yet fully materialized. The Secretary of the Interior, who is responsible for the reclamation aspects of the Pick-Sloan program, has therefore applied some of the unutilized irrigation water to other beneficial uses in ac-

cordance with Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), which authorizes him to supply water from reclamation projects for miscellaneous purposes.

In 1982, the Secretary entered into a water service contract to provide unutilized water presently stored for irrigation purposes at Lake Oahe, a mainstem reservoir in South Dakota, to petitioner ETSI Pipeline Project (ETSI) for use in a proposed coal slurry pipeline. Respondents—the states of Missouri, Iowa, and Nebraska, the Kansas City Southern Railway, and several other parties—filed suit seeking to enjoin performance, contending, among other allegations, that the Secretary of the Interior lacked statutory authority to enter into the ETSI contract. The United States District Court for the District of Nebraska agreed and entered an order permanently enjoining performance of the contract. A court of appeals panel affirmed by a divided vote and an equally divided en banc court denied rehearing.

A. The Formulation of the Pick-Sloan Plan

The Pick-Sloan program is the product of a vigorous national debate over the proper development of the Missouri River Basin, a watershed that encompasses roughly one-sixth of the contiguous United States. It reflects a carefully wrought compromise between the interests of the arid and semi-arid upper basin states—including Montana, North Dakota, South Dakota, and Wyoming—which viewed the Missouri River as a vitally important resource for agricultural and industrial use, and the interests of the more humid lower basin states—including Iowa, Kansas, Missouri, and Nebraska—which sought development of the Missouri River for navigation and flood control purposes.[2]

---

[2] See generally M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan: A Case Study in Congressional Policy Determination* (1955) [hereinafter *The Pick-Sloan Plan*]; Guhin, *The Law of the Missouri*, 30 S.D. L. Rev. 347 (1985).

1. Congress recognized the need to develop the Missouri River Basin early in this century and authorized the Secretary of the Army and the Secretary of the Interior to investigate possible projects within their respective jurisdictions.[3] But the Missouri River's record floods of 1943, which caused nearly $50 million in damages, created the impetus for immediate congressional action. On May 13, 1943, the House Committee on Flood Control adopted a resolution calling upon the Army to review appropriate flood control measures.[4]

The Army Corps of Engineers' Missouri River Division Engineer, Colonel Lewis Pick, prepared a report, the

---

[3] Congress, from 1912 to 1927, authorized the Army to make navigational improvements between Sioux City, Iowa, and St. Louis, Missouri. See Rivers and Harbors Act of 1927, ch. 47, § 1, 44 Stat. 1013; Rivers and Harbors Act of 1925, ch. 467, § 1, 43 Stat. 1188; Rivers and Harbors Act of 1917, ch. 49 § 1, 40 Stat. 259; Rivers and Harbors Act of 1912, ch. 253, § 1, 37 Stat. 219. It also authorized the Army to study the prospects for further navigational and flood control improvements (Rivers and Harbors Act of 1927, ch. 47, § 4, 44 Stat. 1020; Flood Control Act of 1928, ch. 569, § 10, 45 Stat. 538) and the Army submitted a lengthy report. See H.R. Doc. 238, 73d Cong., 2d Sess. (1934). Shortly thereafter, Congress approved construction of the Fort Peck Reservoir on the upper reaches of the Missouri River to improve downstream navigation (Rivers and Harbors Act of 1935, ch. 831, § 1, 49 Stat. 1034) as well as the number of minor flood control projects (Flood Control Act of 1938, ch. 795, § 4, 52 Stat. 1218). See *The Pick-Sloan Plan* 73. Congress, through Section 2 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (43 U.S.C. 411), and Section 9 of the Reclamation Project Act of 1939, 43 U.S.C. 485h, also authorized the Interior Department to investigate projects that would secure water supplies for irrigation, industrial and municipal uses in the arid regions of the nation. In 1939, the Interior Department's Bureau of Reclamation initiated a comprehensive study of reclamation possibilities in the Missouri River Basin.

[4] See *Flood Control Plans and New Projects: Hearings on H.R. 4485 Before the House Comm. on Flood Control*, 78th Cong., 1st Sess. 1-24, 99-103, 884-887 (1944) [hereinafter *H.R. 4485 House Hearings*]; 90 Cong. Rec. 4131 (1944) (reprinting resolution); see also *The Pick-Sloan Plan* 3-5, 51-53.

"Pick Plan," that proposed a comprehensive plan for improvement of the Missouri River Basin. H.R. Doc. 475, 78th Cong., 2d Sess. (1944). The report, submitted to Congress on March 2, 1944, suggested a broad development scheme, costing $481.6 million, that emphasized both navigational improvements and flood control.[5] Other federal agencies, including the Department of Agriculture, the Federal Power Commission, and the Interior Department's Bureau of Reclamation, agreed on the need for a comprehensive Missouri River Basin plan that would provide "the maximum feasible multiple-purpose use of water" and that would make due allowance "for any changed conditions that might arise in the future" (H.R. Doc. 475, *supra*, at 3; see generally *id.* at 5-13).[6] The Corps, in turn, recognized the need for coordinated inter-agency development, stating that the Pick Plan "establishes a broad framework for comprehensive basin-wide improvements" that "is flexible in that it proposes

---

[5] The Pick Plan envisioned the construction of 12 multiple purpose reservoirs (including five mainstem reservoirs); diversion works for transporting water from the proposed Garrison mainstem reservoir in central North Dakota to the Devils Lake area in eastern North Dakota; and levees on the mainstem from Sioux City, Iowa, to the river's mouth. H.R. Doc. 475, *supra*, at 16, 18, 26-28; see *The Pick-Sloan Plan* 78-82; Guhin, *supra*, 30 S.D. L. Rev. at 358-359.

[6] See, *e.g.*, H.R. Doc. 475, *supra*, at 10 (comments of the Federal Power Commission) ("the details must, of necessity, be worked out step by step and the authorizing legislation should, therefore, permit wide latitude in the selection and modification of projects"); *id.* at 13 (comments of the Dep't of Agriculture) ("the extensive program contemplated would necessarily be carried out step by step, with the details formulated progressively in cooperation with other Federal agencies"). The Bureau of Reclamation, which was preparing its own plan, specifically emphasized that any plan for development of the Missouri River Basin "should be truly comprehensive in adequately providing not only for the control of floods and the improvement of navigation, but also for full development of irrigation, hydroelectric power production, and all other beneficial uses of water" (*id.* at 5-6). The Bureau further suggested that the Corps' plan be integrated with the Bureau's forthcoming plan (*id.* at 6).

sufficient latitude to permit such modifications thereof and changes therein as may be found advisable, and it should be augmented by appropriated work of other agencies duly constituted by law to perform such work" (*id.* at 4-5; see also *id.* at 29-30).

Colonel Reber of the Army Corps of Engineers provided the House Committee on Flood Control with a detailed exposition of the Pick Plan, repeatedly emphasizing that the proposed program would provide a broad and flexible framework for development of the Missouri River Basin.[7] The committee later added the proposal to its pending omnibus flood control bill, H.R. 4485, which authorized numerous flood control projects throughout the nation. See H.R. Rep. 1309, 78th Cong., 2d Sess. 23-25 (1944).[8]

---

[7] See *H.R. 4485 House Hearings* 883-908, 1059-1078. Congress also heard testimony from Commissioner Bashore of the Bureau of Reclamation (*id.* at 957-972, 1078-1088), several governors from the Missouri River Basin states (*id.* at 936-956, 973-984), and various state and local officials (*id.* at 984-1057, 1089-1095). The Commissioner explained that the climatic differences within the Missouri River Basin could result in conflicts "between the beneficial, consumptive use of water in the drier areas for domestic, irrigation, industrial and mining purposes, and the use of waters in the humid areas to maintain flowing navigation channels" (*id.* at 958). He suggested that the Basin be developed through coordinated inter-agency efforts (*id.* at 960, 1078-1079) and that Congress exercise care to ensure that the authorized works would not curtail other beneficial water uses (*id.* at 960, 970, 1088). The governors of the upper basin states joined in that suggestion. See *id.* at 945, 974, 978, 982-983.

[8] The committee inserted provisions stating that nothing in the authorization shall be construed to create a demand upon upper basin water resources in excess of that presently authorized by law and that mainstem storage may be placed on tributaries in order to make more water readily available for agricultural and industrial use. See H.R. 1309, *supra*, at 24-25. Rep. Case of South Dakota proposed these provisions to "guard against any loss of rights now existing" and to "emphasize the flexibility [of the Corps' plan] and express the thought of Congress that where the benefits from the project could be increased by a certain modification, it should be done" (90 Cong. Rec. 4222-4224 (1944)).

2. Shortly thereafter, the Bureau of Reclamation, through the efforts of its Montana engineer, W.G. Sloan, completed its own comprehensive plan for development of the Missouri River Basin, the so-called Sloan Plan, which emphasized use of water resources for irrigation in the upper basin states. S. Doc. 191, 78th Cong., 2d Sess. (1944). This lengthy report presented a detailed analysis of the water needs of each main drainage area in the basin and proposed construction of ninety reservoirs (including 3 mainstem reservoirs) that would provide reclamation, hydropower and flood control benefits (*id.* at 2-4, 28-120).[9] The Bureau and the Corps both acknowledged that the Pick Plan and the Sloan Plan differed in several significant respects, but each agreed that the projects were largely complementary and that differences could be worked out through inter-agency cooperation as the projects proceeded (*id.* at 2-4, 6-8, 120-123). The Sloan Plan was referred to the Senate and House Committees on Irrigation and Reclamation.[10]

Meanwhile, on May 8-9, 1944, the House debated H.R. 4485. Two issues figured significantly in that debate. First, representatives from the western states expressed concern that the omnibus bill as a whole, by vesting the

---

[9] See generally *The Pick-Sloan Plan* 82-88; Guhin, *supra*, 30 S.D. L. Rev. at 359-361. The fully developed plan would provide irrigation for 4.7 million acres of dry land and would produce nearly 4 billion kilowatt-hours of power annually. S. Doc. 191, *supra*, at 2-3, 21-25. As in any Bureau reclamation project, irrigators and power users would be expected to repay the project costs assignable to irrigation and power production (*id.* at 4). See Reclamation Project Act of 1939, § 9, 43 U.S.C. 485h. The Bureau estimated that, of the total project cost of $1.2 billion, $741 million would be repayable.

[10] See *Control and Use of the Water Resources of the Missouri River Basin: Hearings on S. 1915 Before a Subcomm. of the Senate Comm. on Irrigation and Reclamation*, 78th Cong., 2d Sess. (1944) [hereinafter *S. 1915 Hearings*]; *Missouri River Basin—Conservation, Control, and Use of Water Resources Including Floodwaters: Hearings on H.R. 4795 Before the House Comm. on Irrigation and Reclamation*, 78th Cong., 2d Sess. (1944) [hereinafter *H.R. 4795 Hearings*].

Corps with substantial flood control powers, would affect the authority of the arid and semi-arid western states to exercise their traditional control over water resources. See 90 Cong. Rec. 4125, 4133-4134, 4139, 4197, 4207-4208, 4228 (1944). The chief concern centered on Section 4 of the bill, which authorized the Corps to provide surplus reservoir storage to meet local water needs.[11] Second, representatives from North Dakota objected that the Pick Plan specifically would deprive the upper Missouri River Basin states of control over water use within their borders. *Id.* at 4140-4142, 4212-4218.[12] The House

---

[11] Under the existing law, communities could obtain storage space at proposed reservoirs by paying the associated costs. Smaller communities had difficulties in raising the large lump sums necessary, and their water needs tended to arise after the reservoirs had been built. See 90 Cong. Rec. 4125-4127, 4197 (1944). Section 4 removed these obstacles by permitting the Army to market surplus water "at such prices and on such terms" as it deemed reasonable. But Rep. Chenoweth (Colo.) expressed concern, later echoed by Rep. Robinson (Utah), that Section 4 could impair water rights obtained under state law (90 Cong. Rec. 4125, 4133-4134, 4197 (1944)). Rep. Curtis (Neb.), a proponent of the bill, stated that "water appropriated for irrigation is not surplus water," that "section 4 would not be controlling in reference to irrigation waters," and that "where there is storage space available for irrigating farm lands that the regulation of that shall be turned over to the Bureau of Reclamation" (*id.* at 4133-4134). Rep. Whittington (Miss.), the chairman of the Flood Control Committee, agreed, stating that Section 4 "would apply only to waters that were surplus and not needed for irrigation or other purposes" (*id.* at 4134). Rep. Curtis added that section 6 of the bill, which authorized the Secretary of the Interior to regulate reclamation storage at Corps flood control facilities, ensured that "control with reference to the available space for irrigation water shall be exercised by the Bureau of Reclamation" (*ibid.*), a point that was reiterated throughout the debate (see *id.* at 4123, 4126 (Rep. Whittington); *id.* at 4130 (Rep. Curtis); *id.* at 4141 (Rep. Whittington)).

[12] Rep. Burdick (N.D.) contended that the Pick Plan would give the Corps control over irrigation works and permit the Corps to deplete basin waters for navigation and flood control purposes (90 Cong. Rec. 4140 (1944)). Rep. Case (S.D.) responded that the special provision he attached to the Pick Plan (see note 8, *supra*), disclaiming authorization of new water uses below Sioux City,

ultimately passed the bill with minor amendments (*id.* at 4232) following repeated suggestions that the Corps' Pick Plan would be coordinated with the Bureau's Sloan Plan (*id.* at 4119, 4133, 4143-4147, 4214, 4217, 4223-4224).

The question of state control of water resources arose again in Senate hearings on H.R. 4485.[13] Senator Millikin (Colo.) proposed and advocated the so-called "O'Mahoney Amendment," which set forth detailed requirements for federal-state coordination of Corps navigation and flood control plans and which gave upstream consumptive water uses, including irrigation, domestic, and industrial applications, priority over downstream navigational uses.[14] The Secretary of the Interior, Harold

---

Iowa, protected the upper basin from downstream depletion (*ibid.*). He noted that the Pick Plan recognized that the Bureau would construct new irrigation works in the upper basin and that the Bureau's Sloan Plan would soon be available (*id.* at 4141). He stated that the Pick Plan "reserves for use above Sioux City the water not previously authorized for projects below Sioux City but makes no distribution of this reservation, leaving that for allocation by agreement among interested parties as reservoirs are constructed from time to time and storage becomes available for distribution" (*id.* at 4142). Rep. Burdick and Rep. Lemke (N.D.) later proposed an amendment requiring that future navigational uses be subordinated to reclamation uses (*id.* at 4212). That amendment was rejected (*id.* at 4218).

[13] See *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. 413-420, 449-455, 465-486, 499-533, 537-622, 641-755, 761-786, 814-816 (1944) [hereinafter *H.R. 4485 Senate Hearings*].

[14] See *H.R. 4485 Senate Hearings* 535-537, 675-728. The O'Mahoney Amendment was precipitated, in part, by the pending omnibus rivers and harbors bill (H.R. 3961, 78th Cong., 2d Sess. (1944)), which included an authorization to dredge a nine-foot channel in the Missouri River from Sioux City, Iowa to the river's mouth. See H.R. Rep. 1000, 78th Cong., 2d Sess. 73 (1944); *River and Harbor Bill: Hearings on H.R. 3961 Before the House Comm. on Rivers and Harbors*, 78th Cong., 2d Sess. 82 (1944)). The upstream states believed that authorization of that project would deplete water available for upstream consumptive use. See *Missouri River Basin: Hearings on H.R. 3961 Before the House Comm.*

Ickes, also suggested certain amendments to clarify the responsibilities of the Corps and the Bureau.[15] With respect to the Missouri River Basin, there was general agreement among the Corps, the Bureau, the state governors, and members of Congress that the Pick and Sloan

---

on Rivers and Harbors, 78th Cong., 2d Sess. (1944). The House, in response, ultimately added a provision to the bill stating that the nine-foot channel would create no new water rights that would displace existing upstream uses. See 90 Cong. 2835-2846 (1944). The upstream states expressed continued concern in Senate hearings on H.R. 3961, where discussion centered on a proposal by Senator O'Mahoney (Wyo.) to provide general protection to upstream interests. See *Rivers and Harbors Omnibus Bill, Missouri River Project, et al.: Hearing on H.R. 3961 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong. 2d Sess. (1944). The O'Mahoney proposal was later modified and introduced as an amendment to both H.R. 3961 and H.R. 4485. See generally *The Pick-Sloan Plan* 91-93; Guhin, *supra*, 30 S.D. L. Rev. at 383-411.

[15] See *H.R. 4485 Senate Hearings* 310-314, 455-465. Secretary Ickes proposed, among other matters, that Section 4 (which permitted the Corps to sell surplus water for domestic and industrial uses) be amended to provide that "the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pursuant to section 6 of this Act" (*id.* at 311-313), thus "extend[ing] these provisions of the reclamation laws to reservoirs where the other provisions of the reclamation laws would be made applicable by section 6 of the bill" (*id.* at 457-458). He also proposed that Section 6 (which authorized the Secretary to prescribe regulations for reclamation use of reservoir storage) be substantially rewritten for purposes of conforming the section to "various technical features of the Federal reclamation laws" (*id.* at 313), including the fact that those laws "are largely designed to authorize a system of contractual relationships" (*id.* at 458). Finally, he suggested that a proviso be added to the Missouri River Basin authorization indicating that "nothing in this Act shall be construed as authorizing any demand upon the water resources of the Missouri River Basin that will adversely affect the beneficial consumptive use of such water resources for municipal, domestic, and livestock water supply, for irrigation of arid and semiarid lands and for mining and industrial purposes" (*id.* at 313), thus "assur[ing] the States and the people of the upper basin that the water upon which their agricultural economy is dependent may not be taken from them" (*id.* at 459).

plans could be successfully coordinated to produce a comprehensive program for development of the Missouri River Basin.[16] On June 22, 1944, the Senate Committee on Commerce issued its report recommending passage of an amended bill that included some of Secretary Ickes' recommendations but did not contain the O'Mahoney Amendment. See S. Rep. 1030, 78th Cong., 2d Sess. (1944).[17]

3. Meanwhile, the Corps and the Bureau continued their efforts to conciliate the Pick and Sloan plans. The chief difference centered on the number and capacity of the mainstem reservoirs between Fort Peck, Montana, and Sioux City, Iowa.[18] On October 25, 1944, the Corps

---

[16] See *H.R. 4485 Senate Hearings* 467, 476 (Gov. Sharpe (S.D.)); *id.* at 507-510, 513-514, 648, 651, 668-669, 697 (Col. Reber); *id.* at 522, 524 (Mr. Sloan); *id.* at 524-525 (Sen. Robertson (Wyo.)); *id.* at 545-546 (Sen. Cordon (Or.)); *id.* at 609-610 (Rep. Case (S.D.)).

[17] The Senate committee did not adopt the Secretary's suggested amendment (see note 15, *supra*) of Section 4, which would have required application of the reclamation laws to the disposition of surplus water from reservoirs utilized for irrigation purposes under Section 6. Instead, the committee amended that section (renumbering it as Section 6) to provide that "no sale of such water shall adversely affect existing lawful uses" (S. Rep. 1030, *supra*, at 4). The committee adopted the Secretary's proposal concerning Section 6 (now renumbered as Section 8), which clarified the Secretary's role in controlling irrigation storage at Army reservoirs (*ibid.*), but it did not adopt the Secretary's suggestion for protecting upstream water consumers in the Missouri River Basin. The committee also added a provision creating a "Missouri River Commission" to assist in planning and controlling navigation and flood control projects in the basin (*id.* at 15). The committee specifically rejected the O'Mahoney Amendment (*id.* at 30-31).

[18] See *H.R. 4485 Senate Hearings* 507-510. The Pick Plan called for the construction of 5 mainstem reservoirs, including the 17 million acre-foot Garrison Reservoir, which was central to the Corps' flood control objectives, and four smaller reservoirs at Oak Creek, Oahe, Fort Randall, and Gavins Point (*ibid.*). The Sloan Plan called for the construction of 3 mainstem reservoirs, including the 19.6 million acre-foot Oahe Reservoir, which was central to the Bureau's reclamation objectives, and two smaller reservoirs at Fort Randall and Big Bend (*ibid.*).

and the Bureau issued a joint report concluding that their respective plans could be coordinated if the agencies exercised shared responsibility—based on each agency's statutory mission and practical expertise—in design as well as in administration at each of the multiple purpose mainstem reservoirs. See S. Doc. 247, 78th Cong., 2d Sess. 1 (1944).[19] This approach yielded a comprehensive plan for six mainstem reservoirs—the existing Fort Peck Reservoir, a large capacity reservoir at Garrison, a large capacity reservoir at Oahe, and three smaller reservoirs at Fort Randall, Big Bend, and Gavins Point (*id.* at 3).[20] Each of these reservoirs would be truly multiple purpose in character, serving "the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power and other uses" (*ibid.*).

Shortly thereafter, on November 16, 1944, the Senate commenced debate on H.R. 4485. A focal point, again, was the matter of protecting the arid states' traditional control of water within their borders. The Senate ultimately adopted, as Section 1 of the bill, a modified version

---

[19] The coordinating document specifically recognized as "basic principles" that: "(a) The Corps of Engineers should have the responsibility for determining mainstem reservoir capacities and capacities for tributary reservoirs for flood control and navigation[;] (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development[;] (c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with other beneficial uses of water." S. Doc. 247, *supra*, at 1. The Pick Plan and the Sloan Plan already provided that the agencies would share a similar functional division of responsibilities in administering the reservoir system. See H.R. Doc. 475, *supra*, at 3-4, 7; S. Doc. 191, *supra*, at 3-4. See also discussion at pages 24-27, *infra*.

[20] The joint report estimated approximate storage capacities for the five new reservoirs, noting that "final storage capacities to be selected for the above reservoirs will be jointly agreed upon after more detailed plans and cost estimates have been made" (S. Doc. 247, *supra*, at 3).

of the O'Mahoney Amendment.[21] The Senate also adopted, with slight modifications, the commitee's version of Section 6, authorizing the Secretary of the Army to supply surplus water for domestic and industrial use, and Section 8, authorizing the Secretary of the Interior (upon approval of the Army) to construct and operate irrigation works at Army reservoirs.[22] Finally, the Senate removed the Missouri River Basin project from the general list of flood control works and created an entirely new provision—Section 9—that authorized both the Pick Plan and the Slcan Plan, as coordinated by the Corps-Bureau joint report. See 90 Cong. Rec. 8553 (1944).

Section 9, reflecting the hybrid character of the Corps-Bureau compromise, implemented the proposed Missouri River Basin program through three basic steps. First, Section 9(a) expressly adopted the Pick Plan, the Sloan Plan, and the Corps-Bureau coordinating document.[23] Next, Section 9(b) specified that the work to be performed by the Army would be an extension of previously

---

[21] See 90 Cong. Rec. 8485-8493, 8546-8548 (1944). These provisions, which were ultimately enacted, provided for federal-state coordination in future Corps and Bureau projects (FCA § 1(a) and (c), 58 Stat. 888-889) and provided that, in the case of projects authorized by the bill, use of water for navigation "shall be only such use as does not conflict with any beneficial consumptive use" in states lying wholly or partly west of the 98th meridian (FCA § 1(b), 58 Stat. 889).

[22] See 90 Cong. Rec. 8551-8553 (1944). The Senate modified Section 6 to state that the Army may "make contracts for" rather than "sell" surplus water (90 Cong. Rec. 8551 (1944)) and added a provision to Section 8 excluding the Section's application to certain previously constructed reservoirs (*id.* at 8552-8553). See FCA §§ 6, 8, 58 Stat. 890, 891.

[23] "The general comprehensive plans set forth in House Document 475 [the Pick Plan] and Senate Document 191 [the Sloan Plan], seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements." FCA § 9(a), 58 Stat. 891.

authorized flood control works, thereby assuring continuity in the Army's Missouri River Basin programs.[24] Finally, Section 9(c) specified that the Interior Department's activities, though authorized in a flood control act, would nevertheless be governed by the reclamation laws in accordance with the basin-wide cost and benefit findings contained in the Pick Plan, the Sloan Plan, and the Corps-Bureau coordinating document.[25] Section 9(c) accordingly ensured that the Interior Department would employ traditional reclamation principles in carrying out its responsibilities.[26]

Following a House-Senate conference, Congress passed the Senate version of H.R. 4485, including Section 9, thus approving the Pick-Sloan Plan.[27]

---

[24] "The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers." FCA § 9(b), 58 Stat. 891.

[25] "Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that the irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands." FCA § 9(c), 58 Stat. 891.

[26] In addition, Section 9(d) authorized an appropriation of $200 million for the partial completion of the Corps works, while Section 9(e) authorized an equal appropriation for partial completion of the Bureau works. See FCA § 9(d) and (e), 58 Stat. 891. The Senate omitted previous provisions (see note 17, *supra*) establishing a Missouri River Commission and left, for another day, the possibility of establishing a "Missouri Valley Authority." See 90 Cong. Rec. 8421-8425 (1944).

[27] H.R. Conf. Rep. 2051, 78th Cong., 2d Sess. (1944); 90 Cong. Rec. 9259-9269, 9277-9287 (1944).

B. The Problem of Unutilized Irrigation Water

For the past one-half century, the Corps and the Bureau have labored diligently and cooperatively to implement the Pick-Sloan Plan. They have completed numerous Pick-Sloan facilities, including the five mainstem reservoirs, numerous tributary reservoirs, power generation facilities, and various irrigation projects.[28] The Pick-Sloan program has achieved several of its principal objectives: it has protected the lower basin states from the ravaging floods that once plagued the area; it has provided low flow water augmentation for navigation; and it has permitted full development of hydroelectric power. However, another important objective, the irrigation of arid and semi-arid lands, has not yet been fully realized. Construction of several large irrigation projects contemplated by the Pick-Sloan Plan has, for various reasons, been discontinued. As a result, a number of the reservoirs that were designed and constructed to accommodate irrigation storage have not been put to full reclamation use.[29] Meanwhile, other potential water uses have arisen

---

[28] See Guhin, *supra*, 30 S.D. L. Rev. at 411-414. The mainstem reservoirs presently have a total normal storage capacity of 74 million acre-feet that is categorized for administrative purposes into four "storage zones" designated as (1) flood control (4,675,000 acre-ft); (2) flood control and multiple use (11,644,000 acre-ft); (3) carryover multiple use (39,467,000 acre-ft); and (4) inactive (18,335,000 acre-ft).

[29] Lake Oahe, South Dakota's 231 mile-long mainstem reservoir, is the leading example. Under the Corps of Engineers' Pick Plan, that reservoir would have had a capacity of only 6 million acre feet. The Pick-Sloan compromise adopted the Bureau of Reclamation's design, which specified an approximate capacity of 19.6 million acre feet, to provide, among other uses, for the irrigation of 750,000 acres of cropland in the James River Basin. See S. Doc. 247, *supra*, at 2-3; S. Doc. 191, *supra*, at 115. Congress later withdrew its authorization to construct the James River irrigation works. See Act of Aug. 14, 1964, Pub. L. No. 88-442, 78 Stat. 446. It subsequently reauthorized the James River project under a different

in the upper basin states, including water demand for development of the area's vast coal deposits.

Following the 1973 Arab oil embargo, the Interior Department, after careful study and consultation with the Army, proposed a program for supplying unutilized irrigation water from the Pick-Sloan program to assist in developing coal resources in the upper basin states.[30] The Interior Department determined that it could exercise its authority under Section 9(c) of the Reclamation Project Act of 1939, to market for industrial use unutilized irrigation water stored in Missouri River mainstem reservoirs.[31] The Army's Acting General Counsel recognized the need for consultation between the two agencies and suggested coordination and cooperation in determining whether the marketing of water for industrial purposes would adversely affect the reclamation and flood control purposes of the project.[32] Shortly thereafter, on February

---

design (Act of Aug. 3, 1968, Pub. L. No. 90-453, 82 Stat. 624), but thereafter discontinued the project (WEB Rural Water Development Project Act of 1982, Pub. L. No. 97-273, §§ 3a, 4, 96 Stat. 1181, 1182). See Guhin, *supra*, 30 S.D. L. Rev. at 425-431. As a result, Lake Oahe presently has substantial unutilized irrigation storage capacity.

[30] See Report of the Ad Hoc Committee on Water Marketing (July 1, 1974) (C.A. App. 157-163). That report concluded that up to 3 million acre-feet of water stored, but not currently used, for irrigation purposes in the Missouri River mainstem reservoirs could be made available for industrial use (*id.* at 159). See generally Bureau of Reclamation, U.S. Dep't of the Interior, *Final Environmental Impact Statement: Water for Energy—Missouri River Reservoirs* (1977).

[31] See Memorandum from the Solicitor to the Secretary of the Interior (Nov. 27, 1974) (J.A. 120-127). Section 9(c) of the Reclamation Project Act authorizes the Secretary "to enter into contracts to furnish water for municipal water supply or miscellaneous purposes" provided that the contracts "will not impair the efficiency of the project for irrigation purposes" (43 U.S.C. 485h(c)).

[32] See Memorandum from Richard V. Kearney, Office of the Gen. Coun., Dep't of the Army, to the Chief, Office of Civil Functions (Dec. 16, 1974) (J.A. 128-135). Mr. Kearney concluded that

24, 1975, the Secretary of the Interior and the Secretary of the Army entered into a Memorandum of Understanding (MOU) stating that "the Secretary of the Interior may, pursuant to applicable authorities, both on his own behalf and as agent for the Secretary of the Army, contract for the marketing of water for industrial uses" (J.A. 136).[33] The Secretary of the Interior subsequently approved two water service contracts that would provide water from mainstem reservoirs for energy development projects in the upper basin states.[34] The MOU expired, following several extensions, in 1978 (see *id.* at 138-144).

C. The Present Controversy

After the expiration of the MOU, ETSI Pipeline Project, a joint venture formed to design, construct, and operate a coal slurry pipeline from Wyoming's Powder River Basin to the southeastern United States, petitioned

---

"if Interior certifies that the storage proposed to be marketed for industrial purposes * * * 'will not impair the efficiency of the project for irrigation,' 43 U.S.C. § 485h, the Army should be prepared jointly to cooperate with Interior * * * unless it determines, pursuant to its responsibility under S. Doc. 247, that such use would interfere with the operation of the reservoirs for flood control" (J.A. 135). He saw "no legal reason" why Interior could not provide mainstem water for industrial use (*ibid.*), but added that "the Secretary of Interior may not market the water from these reservoirs independently" (*id.* at 135 n.*).

[33] The Interior Department and the Army described the water marketing program to Congress in subsequent hearings. See *Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 3-11, 22-62, 403-455 (1975) [hereinafter *1975 Industrial Water Marketing Hearing*].

[34] The Secretary entered into contracts with Basin Electric Power Cooperative providing water from Lake Sakakawea (the Garrison Reservoir) (J.A. 145) and with the State of Montana providing water from the Fort Peck Reservoir (see Montana Amicus Br. at 2-3). A third contract providing water to ANG Coal Gasification Company from Lake Sakakawea, refers to the MOU but was signed after the MOU expired (J.A. 146).

the Interior Department for a forty-year water service contract permitting the withdrawal of 20,000 acre-feet of water per year from Lake Oahe, an underutilized mainstem reservoir.[35] The Interior Department's Bureau of Reclamation, which continued to follow the basic policy and principles set forth in the MOU (J.A. 147-151), reviewed ETSI's request, discussed it with the Army Corps of Engineers, and negotiated a water service contract for the proposed diversion (J.A. 212-223). The Secretary of the Interior approved the contract and it was signed on behalf of the United States on July 2, 1982 (J.A. 224-256).

Shortly thereafter, respondents brought a suit against ETSI, the Secretary of the Interior, and the Secretary of the Army, challenging the contract and the associated federal permits and approvals. South Dakota, which had issued the underlying state water use permit, attempted to intervene in the matter. However, a magistrate denied that request (Mem. Op. No. CV82-L-442 (D. Neb. Jan. 13, 1983)). The district court later rejected the government's objections that the lower basin states lacked standing to challenge the ETSI contract (Mem. Op. No. CV82-L-442 (D. Neb. Mar. 7, 1984)).

With respect to the merits, respondents contended, among many other allegations, that the Secretary of the Interior lacked statutory authority to enter into a water service contract with ETSI. The government responded that Congress, by approving the Pick-Sloan Plan in Section 9 of the Flood Control Act, authorized the Secretary of the Interior to administer water stored for irrigation

---

[35] See note 29, *supra*. ETSI first petitioned the Army and Interior for a water service contract in 1973. *1975 Industrial Water Marketing Hearing* 9, 436-438. Since that time, ETSI had obtained a state water use permit through assignment from the South Dakota Conservancy District for its proposed use (J.A. 152-206), the Interior Department's Bureau of Land Management had prepared an Environmental Impact Statement evaluating ETSI's project (J.A. 213), and the Army Corps of Engineers had prepared an Environmental Assessment addressing ETSI's proposed intake structure at Lake Oahe (J.A. 213-214).

at the Missouri River mainstem reservoirs and that Section 9(c) of the Reclamation Project Act specifically authorized the Secretary to market that water for industrial use. The district court disagreed and permanently enjoined performance of the ETSI water service contract (Pet. App. 45a-72a).

The court focused on Section 9(c) of the Flood Control Act, which provides that "the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891). It reasoned that this Section permits the Secretary to invoke the reclamation laws only where the Bureau had undertaken "reclamation or power developments" (Pet. App. 53a-54a). The court concluded that "Oahe Dam was not a reclamation or power development to be undertaken by the Secretary of the Interior pursuant to § 9(c) of the Flood Control Act" (*id.* at 54a). Instead, it "was built under § 9(b), which concerned projects to be built by the Corps" (*ibid.*).[36]

---

[36] Following the district court's injunction, ETSI announced that it had decided to suspend the coal slurry project. Prior to argument, the court of appeals remanded the case to the district court for a determination of mootness. The district court concluded that a live controversy remained because the contract had not been terminated or abandoned and because the contract was part of Interior's basin-wide water marketing program (U.S. Reply Br. Addendum 3a-7a). The court of appeals subsequently affirmed that conclusion (*id.* at 1a-2a). Meanwhile, the State of South Dakota, excluded from direct participation in this case, sought leave to file an original action in this Court against the States of Nebraska, Iowa, and Missouri. *South Dakota* v. *Nebraska*, No. 103, Orig. (Mar. 31, 1986). South Dakota urged that the Flood Control Act effected a statutory apportionment of the Missouri River, giving South Dakota control over the use of waters stored for irrigation in the Corps of Engineers' Missouri River mainstem reservoirs within that state. The United States, in response to this Court's invitation, filed a brief *amicus curiae* suggesting that the Court defer action on South Dakota's application for leave to file a complaint pending resolution of the instant case by the court of appeals. This Court subsequently permitted the State of North Dakota to intervene and dismissed South Dakota's application without prejudice (No. 103, Orig. (Mar. 31, 1986)). On October 1, 1986, South Dakota renewed its motion for leave to file a complaint.

The court of appeals affirmed the district court's judgment (Pet. App. 1a-44a). It first rejected the government's standing and jurisdictional arguments (*id.* at 11a-15a & n.7), which we no longer assert in this Court. Following the district court's analysis, it then stated that "[t]he inquiry in this case is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to section 9(c) of the [Flood Control] Act" (*id.* at 19a). The court of appeals agreed with the district court that Oahe is not a reclamation development and rejected the government's argument that the Pick-Sloan Plan authorizes the Secretary of the Interior to exercise control over water stored in Lake Oahe for irrigation use. It stated that "Section 9 of the Act simply adopts the projects proposed in the Pick-Sloan plan and directs that the reclamation laws apply to those undertaken by the Secretary of the Interior" (*id.* at 23a-24a). The court cited other provisions of the Flood Control Act to support its conclusion (*id.* at 24a-32a) and refused to defer to the Secretary's contrary interpretation (*id.* at 32a-35a). Judge Bright dissented (*id.* at 36a-44a) and an equally divided court denied rehearing en banc (*id.* at 74a-75a).[37]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress approved the Pick-Sloan Plan to serve the needs of the entire Missouri River Basin by providing the arid and semi-arid upper basin states with irrigation water while promoting commerce and protecting the lower basin states from seasonal floods. The Pick-Sloan program has met the flood control and navigation needs

---

[37] Judge Bright concluded that the Secretary's interpretation is a reasonable construction of ambiguous statutory language and therefore entitled to deference (Pet. App. 36a). He noted that the majority's construction would deprive Interior of authority to manage the waters contained "in the largest federal reservoir in the Missouri Basin—a reservoir located in an upstream state and designed with the anticipation that its major consumptive use would be irrigation" (*id.* at 43a). Judge Bright, as a senior judge, was not eligible to participate on the request for rehearing en banc.

of the lower basin states and has provided full development of hydroelectric power; however, the upper basin's anticipated irrigation needs have not yet materialized. The question now is whether the Secretary of the Interior may distribute unutilized irrigation water from the mainstem reservoirs for other state-approved beneficial uses.

The answer to this question would seem almost self-evident. Congress approved a flexible program, jointly administered by the Department of the Army and the Interior Department, that could respond to the evolving water resource requirements of the basin states. The Interior Department's distribution of presently unneeded irrigation water to other state-approved beneficial uses is fully consistent with the intentions of Congress and with desires of the arid upper basin states, which supported the Pick-Sloan Plan in the expectation that they would be permitted to put the vast amounts of water impounded within their borders to beneficial use. Respondents' legal objections are insubstantial and reflect a parochial unwillingness to share the Missouri River Basin's resources for the benefit of the nation.

Section 9 of the Flood Control Act provides the Secretary of the Interior with legal authority to enter into the ETSI contract. Section 9(a) approves the Pick-Sloan Plan, which specifically grants the Secretary of the Interior authority to administer the reclamation aspects of the program. That authority, under the specific terms of the Plan, includes the power to dispose of waters stored for irrigation at the mainstem reservoirs. Section 9(c) of the Flood Control Act provides, in turn, that the Secretary shall exercise his authority in accordance with the federal reclamation laws. Those laws specifically permit the Secretary to supply reclamation water for industrial use. See Reclamation Project Act of 1939, § 9(c), 43 U.S.C. 485h(c). Thus, the Secretary may supply water stored but not needed for irrigation at Lake Oahe to ETSI for that company's proposed industrial application.

The Secretary of the Interior's conclusion that he is authorized to enter into the ETSI contract finds additional support outside the specific language of Section 9 of the Flood Control Act and the Pick-Sloan Plan. First, it is consistent with the overall objectives of Congress, which passed the Flood Control Act to provide a comprehensive yet flexible program for development of the Missouri River Basin that would provide maximum basin-wide benefits. The Secretary's marketing of water intended but not presently needed for irrigation purposes plainly advances that goal. The Secretary's interpretation of Section 9 is further supported by the established practices that have historically governed the administration of the Pick-Sloan Plan. Those practices demonstrate that the Army and the Interior Department have long recognized that each agency plays an important role at each facility based on the functions that the facility is designed to fulfill. The Secretary's undertaking to provide unutilized irrigation water from Army-operated facilities for industrial purposes is simply one example of that functional division of authority.

In these circumstances, the Secretary of the Interior's interpretation of his powers under Section 9 of the Flood Control Act is entitled to deference from the courts. The Secretary's interpretation is plainly reasonable. And deference is particularly appropriate here, where the governing statute is written in broad language, the Secretary was intimately involved in the creation of the legislative program, he has consistently adhered to his interpretation, and Congress has expressed no dissatisfaction with his construction of the statute.

ARGUMENT

THE SECRETARY OF THE INTERIOR MAY ENTER INTO CONTRACTS, PURSUANT TO THE FEDERAL RECLAMATION LAWS, TO SUPPLY UNUTILIZED IRRIGATION WATER FROM MISSOURI RIVER MAINSTEM RESERVOIRS FOR INDUSTRIAL USE

The question in this case is whether the Secretary of the Interior may enter into a contract pursuant to the federal reclamation laws to supply the ETSI Pipeline Project with water, presently stored but not utilized for irrigation purposes at Lake Oahe, for ETSI's proposed industrial use. We submit that the Secretary correctly determined that he possesses such authority. That determination is consistent with the language and purpose of the Flood Control Act, as well as with the actual design and longstanding administration of the Pick-Sloan Plan. The Secretary's interpretation of his authority is plainly reasonable and entitled to deference from the courts.

I. Congress, In Approving The Pick-Sloan Plan, Authorized The Secretary Of The Interior To Administer The Reclamation Aspects Of Mainstem Reservoirs, Including Disposition Of Water Stored, But Not Presently Needed, For Irrigation Use

Our analysis begins, of course, with the language of the controlling statute, Section 9 of the Flood Control Act.[38] Section 9(a), through its approval of the Pick-Sloan Plan, grants the Secretary of the Interior authority to administer the reclamation aspects of the program. And Section 9(c) specifies, in turn, that the Secretary shall exercise that authority in accordance with the federal reclamation laws, including the Reclamation Project Act of 1939, which specifically permits the Secretary to

---

[38] See, *e.g.*, *United States* v. *James*, No. 85-434 (July 2, 1986); *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 5; *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 735 (1985); *United States* v. *Yermian*, 468 U.S. 63, 68 (1984); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979).

supply irrigation water for industrial use. § 9(c), 43 U.S.C. 485h(c). Thus, the Secretary may supply water stored for irrigation at Lake Oahe to ETSI for that company's proposed industrial application.

A. Section 9(a) of the Flood Control Act

Section 9(a) of the Flood Control Act specifically approved the comprehensive program for the Missouri River Basin set forth in the Pick Plan, the Sloan Plan, and the Corps-Bureau coordinating report (58 Stat. 891). Those documents, which express the basic expectations of Congress and the implementing agencies,[39] specify that the Secretary of the Interior shall administer the reclamation aspects of the mainstem reservoirs for maximum beneficial use. The documents indicate that the Secretary's authority extends to disposition of water stored, but not presently used, for irrigation purposes.

The Pick Plan articulates three principles of particular relevance to this case. First, it proposes that the Missouri River Basin program be constructed and administered to assure that the Missouri River's waters are put to full and efficient use. H.R. Doc. 475, *supra*, at 3-5.[40]

---

[39] When Congress approves a proposed plan for such projects, it adopts the basic policy for the systematic development of the river basin set forth in the accompanying reports. See *United States ex rel. Chapman* v. *FPC*, 345 U.S. 153, 163 (1953). Senator Overton described the process for formulation and congressional review of public works projects in considerable detail. See 90 Cong. Rec. 8227-8228 (1944) (Sen. Overton). As he later explained, "the course has not been to reproduce an entire report in the bill, but simply to refer to the report * * *. Then the projects are authorized pursuant to the report. There could not very well be any other legislative process" (*id.* at 8564). See also *H.R. 4485 Senate Hearings* 667 (Col. Reber).

[40] "It is evident that all the Federal agencies concerned agree that the maximum feasible multiple-purpose use of water and the broadest economic program of reservoirs for that type of use are the primary principles on which the planned development of the water resources of the Missouri River Valley should be based." H.R. Doc. 475, *supra*, at 3. See *H.R. 4485 House Hearings* 1065, 1076 (Col. Reber); *H.R. 4485 Senate Hearings* 513-514, 650, 669 (Col. Reber). See also pages 5-6, *supra*.

Second, it indicates that the program must be sufficiently flexible to permit adjustment in response to changing needs of the basin (*ibid.*).[41] And third, it emphasizes that the Secretary of the Interior shall administer the reclamation aspects of the proposed program, including disposition of water stored for irrigation purposes. The Pick Plan describes the functional division of authority between the Corps and the Bureau as follows (H.R. Doc. 475, *supra*, at 3-4 (emphasis added)):

> It is essential * * * that the mainstem projects be built, operated, and maintained by the Corps of Engineers, and that the utilization of storage reserved for flood control in all multiple-purpose reservoirs on tributaries be in accordance with regulations prescribed by the Secretary of War * * *. *Conversely, utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior.*

The Pick Plan thus places responsibility for the day-to-day operation of the mainstem reservoirs with the Army, but provides that the Secretary of the Interior shall prescribe how waters, collected for irrigation purposes, should be applied for optimal reclamation use.

The House was plainly aware of, and approved of, this functional division of authority when it included the Pick Plan among the projects authorized by the House bill.[42]

---

[41] "It is equally evident that to accomplish this type of development, the details of planning must be worked out in a progressive manner through the correlation and coordinated efforts of all agencies, Federal, State, and local, concerned with these resources. Due allowance must be made for any changed conditions that may arise in the future." H.R. Doc. 475, *supra*, at 3. See *H.R. 4485 House Hearings* 1065-1066 (Col. Reber); *H.R. 4485 Senate Hearings* 508, 513-514, 669, 671, 695 (Col. Reber). See also pages 5-6 & n.8, *supra*.

[42] Thus, Rep. Case stated, "I know by the testimony before the Flood Control Committee and by specific statements made over the signature of the Chief of Engineers and by the provisions of House Document 475, which is referred to in the Missouri River

Indeed, it approved the extension of similar authority to all of the flood control programs contained in the House bill by providing—in Section 6—that whenever the Secretary of the Army determines that an Army-operated reservoir could be used for reclamation purposes, "it shall be the duty of the Secretary of the Interior to prescribe regulations for the use of the storage available for such purpose" (H.R. Rep. 1309, *supra*, at 8, 53).[43]

The Sloan Plan, which was issued several months after the Pick Plan, also proposes that the Missouri River Basin be developed in a comprehensive, yet flexible, manner that assures full and efficient use of the available water resources. See S. Doc. 191, *supra*, at 1-4, 10-11.

---

paragraph, that it is contemplated the Bureau of Reclamation shall operate all reclamation that may grow out of the storage or [*sic*] main stem, and most specifically that the Bureau of Reclamation shall develop as much irrigation as it wants to on any of the tributaries or branches of the Missouri River and that the Army engineers care nothing about it." 90 Cong. Rec. 4141 (1944). He later added, "It will be clear * * * from this record, that there is no objection by the Army engineers to the program of Reclamation for handling irrigation water and for constructing and operating irrigation works" (*id.* at 4147).

[43] The provision received extensive discussion in the House debate. See 90 Cong. Rec. 4126 (1944) (Rep. Whittington) ("Section 6 * * * gives to the Secretary of the Interior power of handling reclamation and the disposal of reclamation waters provided by the projects authorized in this bill."); *id.* at 4134 (Rep. Curtis) ("The thing that we have done in this bill is to state that in any reservoir where there is storage space available for irrigating farmlands that the regulation of that shall be turned over to the Bureau of Reclamation, which is a concession on the part of the Army."); *ibid.* (Rep. Curtis) ("We have stated in this bill that control with reference to the available space for irrigation water shall be exercised by the Bureau of Reclamation."); *id.* at 4141 (Rep. Whittington) ("[T]he Corps of Engineers is not going to do a thing on earth except to make the water there available to [the Bureau of Reclamation], when there is water for reclamation."). The Senate later modified the language of this section (renumbering it as Section 8) but, as we discuss later (see notes 45, 71, *infra*), that modification did not change the basic goal of the provision or alter the Interior Department's authority over the reclamation aspects of the Pick-Sloan program.

Furthermore, it designates the same functional division of authority prescribed by the Pick Plan (*id.* at 3-4). The Sloan Plan specifically states (*id.* at 11 (emphasis added)):

> All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. * * * *All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.*

Thus, the Pick Plan and the Sloan Plan are in complete accord in designating the division of authority between the Army and Interior. Both plans provide, quite sensibly, that each agency shall have authority at the various reservoirs to administer the functions that fall within the particular agency's mission and expertise.[44]

---

[44] Notably, President Roosevelt fully supported this functional division of authority. He stated in a February 7, 1944 letter to Rep. Whittington (90 Cong. Rec. 8623 (emphasis added)):

> In my letter of May 5, 1941, I suggested that a sound policy in connection with [multiple purpose] water projects would consist of selecting the construction agency by determining the dominant interest. * * * *No matter which agency builds a multiple-purpose structure involving in even a minor way the interests of the other, the agency with the responsibility for that particular interest should administer it in accordance with its authorizing legislation and general policies. For example, the Bureau of Reclamation * * * should administer, under the reclamation laws and its general policies those irrigation benefits and phases of projects built by the Corps of Engineers.*

As Senator O'Mahoney later explained, the President himself played a role in achieving the Pick-Sloan compromise. See *id.* at 8489; see also *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the*

The Corps-Bureau coordinating document served to reconcile the differences between the Pick and Sloan plans. See S. Doc. 247, *supra*. Because the plans agreed on the proper division of administrative authority, there was no need for the coordinating document to address that issue. Instead, the document addressed certain basic design differences between the two plans, involving the size and location of the mainstem reservoirs (see pages 11-12, *supra*). Notably, however, the document resolved the design differences through a functional division of authority analogous to that employed for the administrative features of the Pick and Sloan plans: the Corps would determine water storage capacities for flood control and navigation purposes at each mainstem reservoir, while the Bureau would determine water storage capacities for reclamation purposes at those same reservoirs. S. Doc. 247, *supra*, at 1; see pages 11-12, *supra*.

Thus, when the Senate turned to H.R. 4485, there was no dispute between the Corps and the Bureau over how design and administrative authority in the Missouri River Basin should be allocated. See 90 Cong. Rec. 8375 (1944) (Sen. Overton). The Corps and the Bureau had already reached a full consensus on the matter through coordination of the Pick and the Sloan Plans, and Congress, through Section 9(a) of the Flood Control Act, simply ratified the inter-agency agreement contained in the three relevant documents (90 Cong. Rec. 8553 (1944)).[45] In-

---

Senate Comm. on Public Works, 85th Cong., 1st Sess. Pt. 1, at 320 (1957) [hereinafter *1957 Senate Hearings*].

[45] Congress also retained the substance of Section 6 of the House bill (renumbered as Section 8), which specified how administrative authority should be divided for *other* flood control programs where no such inter-agency cooperative arrangements had been worked out in advance. The Senate made certain technical changes to that section at Secretary Ickes' suggestion (see notes 15 & 17, *supra*) that were intended simply to reflect that reclamation laws are largely designed to authorize a system of contractual relationships. See generally *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093, 1105-1111 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). Those changes could not, of course, alter the spe-

deed, when Congress modified the Pick-Sloan program twelve years later, approving construction of two additional tributary dams (Act of May 2, 1956, ch. 231, 70 Stat. 126), the accompanying Senate report described the longstanding arrangement as an accepted feature of the program, stating that "the Secretary of the Interior is responsible for the disposal of water for irrigation or space reserved for this purpose in any of the dams in the Missouri River Basin project, while the Secretary of the Army is responsible for flood-control regulation." S. Rep. 1066, 84th Cong., 1st Sess. 3 (1955).

Section 9(a) of the Flood Control Act, through its approval of the Pick-Sloan Plan, thus answers the question of who should ensure that water stored but not presently needed for irrigation purposes at Lake Oahe is put to maximum beneficial use. The Secretary of the Interior is responsible "for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development" (S. Doc. 247, *supra*, at 1). He is responsible for administration of reclamation functions (S. Doc. 191, *supra*, at 11) and the "utilization of storage reserved for irrigation" (H.R. Doc. 475, *supra*, at 4). It naturally follows, under the Pick-Sloan Plan's functional division of authority, that he is authorized to determine the proper application of irrigation waters not presently needed for irrigation use.

B. *Section 9(c) of the Flood Control Act*

Section 9(a) of the Flood Control Act authorizes the Secretary of the Interior to administer all reclamation

---

cifically agreed-upon and independently approved division of administrative authority for the Pick-Sloan program. It is well settled that special provisions prevail over general ones which, in the absence of the special provisions, might otherwise control. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 158 (1976); *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 756, 758 (1961); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957); *Missouri* v. *Ross*, 299 U.S. 72, 76 (1936); *Kepner* v. *United States*, 195 U.S. 100, 125 (1904).

aspects of the resulting water resources program. But the Secretary does not have unbridled discretionary power. Section 9(c) of the Act makes clear that the "reclamation and power developments to be undertaken by the Secretary under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891). Section 9(c) thus identifies the source of law—namely, federal reclamation law—that governs *how* the Secretary shall exercise his authority. The Secretary has looked to that body of law to determine how to apply Lake Oahe's unutilized irrigation water to other beneficial uses. He has relied specifically—and, we submit, quite properly—on another Section 9(c), Section 9(c) of the Reclamation Project Act of 1939, which permits him to "enter into contracts to furnish water for municipal water supply or miscellaneous purposes" provided that the contracts "will not impair the efficiency of the project for irrigation purposes" (43 U.S.C. 485h(c)). See J.A. 120-127.[46]

There is no legislative history explicitly describing the interplay of Section 9(a) and Section 9(c) of the Flood Control Act. See 90 Cong. Rec. 8553 (1944). We submit, however, that the Congress's objective is apparent. Congress originally drafted the Flood Control Act of 1944 as a vehicle for authorization of Army flood control programs, including the Pick Plan. It recognized, however, that it could not simply add the Sloan Plan—an Interior-conceived reclamation program—to the list of Army flood control programs. Congress therefore formulated Section 9 specifically to address the hybrid character of the Pick-Sloan Plan. Section 9(a) approved the Pick and Sloan Plans, as coordinated by the Corps-Bureau agreement. Section 9(b) ensured that the Army-constructed works would be integrated with pre-existing Army flood control

---

[46] As the court of appeals recognized (Pet. App. 30a n.21), it is not disputed that the Secretary may rely on this provision when entering into industrial water service contracts for irrigation water stored at the Bureau of Reclamation's Pick-Sloan tributary facilities. See *Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979), aff'g in pertinent part, *Environmental Defense Fund, Inc.* v. *Morton*, 420 F. Supp. 1037 (D. Mont. 1976).

structures. And Section 9(c) satisfied the wary arid states that the Pick-Sloan Plan's reclamation activities, though authorized in a flood control act, would nevertheless be governed by familiar principles of federal reclamation law.[47]

The court of appeals rejected this sensible interpretation of Section 9. The court mistakenly concluded that Section 9 "simply adopts *the projects* proposed in the Pick-Sloan plan and directs that the reclamation laws apply to those undertaken by the Secretary of the Interior" (Pet. App. 23a-24a (emphasis added)). It stated that the only inquiry in this case "is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to Section 9(c)" (*id.* at 19a). We submit that this is the wrong question. The court's central premise—that the Secretary can exercise reclamation authority only at Bureau-constructed projects—cannot be squared with Section 9 and the Pick-Sloan scheme.

As an initial matter, Section 9(a) of the Flood Control Act quite plainly approves "general comprehensive plans" (58 Stat. 891) and not merely the projects contained

---

[47] See note 59, *infra*. Congress took similar action with respect to Section 8 of the Flood Control Act, which permits the Secretary of the Interior to construct reclamation works at other dams (not authorized under Section 9) constructed by the Army. See FCA § 10, 58 Stat. 891. That section, when originally drafted by the House committee (and then numbered Section 6) simply provided that the Secretary of the Interior would prescribe regulations governing reclamation use of Army reservoirs. See H.R. Rep. 1309, *supra*, at 53. The chairman of the House Flood Control Committee, Rep. Whittington, received objections that the Commissioner of Reclamation might "prescribe regulations ad libitum without regard to existing law" (90 Cong. Rec. 4202 (1944)). The House therefore amended that section to require that the Secretary prescribe regulations "under existing reclamation law" (*ibid.*). When Section 8 emerged from the Senate committee, it contained a provision substantially identical to that contained in Section 9(c), requiring compliance with "the Federal reclamation laws" (58 Stat. 891). See *Tulare Lake Canal Co.*, 535 F.2d at 1104-1111.

therein.[48] It therefore approves the division of administrative authority specified in three complementary documents that comprise the Pick-Sloan Plan. Second, as we have explained (pages 24-28, *supra*), those three documents specify that the Secretary shall administer *all* of the reclamation aspects of the program; they do not limit the Secretary's authority to those physical works that the Bureau of Reclamation has constructed. And third, Section 9(c)'s requirement that "reclamation and power developments to be undertaken by the Secretary * * * under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891) was enacted to ensure that the Secretary's resulting broad powers, including the authority to distribute irrigation water, will be exercised in accordance with federal reclamation law. Section 9(c) was intended to eliminate any doubt that the Secretary's activities under the Pick-Sloan Plan would be governed by familiar reclamation principles. There is no reason to believe that Congress enacted Section 9(c) to override an inter-agency plan for cooperation by *preventing* the Secretary from administering the reclamation aspects of Army-constructed facilities.[49]

The court of appeals' inquiry (Pet. App. 19a-20a) into whether the Department of the Interior constructed or operates Lake Oahe accordingly is misdirected. The Secretary need not pour concrete or turn valves to engage in "reclamation developments" within the meaning of Section 9(c). The dictionary meaning of the word "development" plainly embraces activities other than construction of physical works and specifically includes the act of "making usable or avaliable" (*Webster's New In-*

---

[48] See H.R. Conf. Rep. 2051, *supra*, at 7-8; 90 Cong. Rec. 9284 (1944) (Rep. Curtis) (explaining that the Pick Plan and the Sloan Plan are each "approved and authorized" as coordinated by the Corps-Bureau report).

[49] As Rep. Curtis stated in presenting the House conference report, "This legislation retains for the Army engineers authority over flood control and retains for the Bureau of Reclamation authority over irrigation. It lays down a pattern for their future cooperation." 90 Cong. Rec. 9284 (1944).

ternational Dictionary 618 (3d ed. 1976)).[50] Thus, when the Secretary defines the irrigation storage needs at mainstem reservoirs, determines the proper disposition of the resulting impounded water, or enters into contracts to make that water available for a recognized reclamation use (see note 46, *supra*), he is engaged in a reclamation development.[51] Congress plainly understood that the Secretary would administer reclamation storage at Army reservoirs as well as construct and operate Bureau of Reclamation facilities.[52] The court of appeals'

---

[50] Indeed, when Congress wished to describe particular physical works in Section 9's other subsections, it specifically used the word "works." See FCA § 9(b), (d), and (e), 58 Stat. 891. The significant linguistic differences between the words used in these adjoining subsections strongly indicates that Congress intended the term "reclamation developments" to have a broader meaning than the term "works." See *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 9.

[51] Notably, Section 9(c) provides that "reclamation * * * developments *to be* undertaken by the Secretary" shall be subject to the federal reclamation laws (58 Stat. 891 (emphasis added)). Thus, Section 9(c) requires the Secretary to apply federal reclamation law to activities "to be undertaken" at some future date as well as those actually undertaken and completed. It naturally follows that the Secretary should also look to federal reclamation law to determine how best to use water resources that are made available when, as in the present case, the construction of planned irrigation works is suspended.

[52] As Rep. Whittington, chairman of the House Committee on Flood Control, stated, "public policy requires not only that flood control storage be under the supervision of the Secretary of War and the Chief of Engineers but also that *storage for the reclamation of arid lands* be under the supervision of the Secretary of the Interior" (90 Cong. Rec. 4127 (1944) (emphasis added)). See also *id.* at 4126 (Rep. Whittington) (the Secretary is responsible for "reclamation *and* the disposal of reclamation waters provided by the projects authorized in this bill") (emphasis added); *id.* at 4130 (Rep. Curtis) (the bill "gives the Bureau of Reclamation jurisdiction over the irrigation features of the reservoirs *and* the distribution systems") (emphasis added); *id.* at 4134 (Rep. Curtis) ("control with reference to the *available space for irrigation water* shall be exercised by the Bureau of Reclamation") (emphasis

contrary determination undermines a fundamental pillar of the Pick-Sloan Plan.

II. The Secretary's Interpretation Of Section 9 Of The Flood Control Act Is Consistent With The Stated Objectives Of Congress And The Overall Plan For Administration Of The Pick-Sloan Program

The Secretary's conclusion that he is authorized to enter into contracts providing water from mainstem reservoirs for industrial use finds additional support outside of the specific language of Section 9 and the Pick-Sloan Plan. His conclusion is fully consistent with the goals that Congress expressed in approving the Pick-Sloan program and with the established practices of the Army and the Interior Department for its effective administration.

A. *The Objectives of Congress*

This Court has repeatedly stated that when courts or agencies expound a statute, they should pay heed "to the provisions of the whole law, and to its object and policy." [53] Here, Congress passed the Flood Control Act to provide for comprehensive development of the nation's water resources. Congress specifically intended that Section 9 would authorize a flexible development program for the Missouri River Basin that would provide maximum basin-wide benefits. The Secretary's marketing of water intended but not presently needed for irrigation purposes plainly advances that goal.

---

added); *id.* at 4147 (Rep. Case) ("there is no objection by the Army engineers to the program of Reclamation for handling irrigation water *and* for constructing and operating irrigation works") (emphasis added). See also note 42, *supra*. Senator Overton, chairman of the Senate Commerce Committee's Subcommittee on Flood Control expressed the same view (*id.* at 8625, 8626).

[53] *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op. 10; *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), slip op. 6; *Offshore Logistics, Inc.* v. *Tallentire*, No. 85-202 (June 23, 1986), slip op. 13; *Mastro Platics Corp.* v. *NLRB*, 350 U.S. 270, 285 (1956); *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850).

As we have noted (see pages 24-26, *supra*), the Corps and the Bureau formulated the Pick-Sloan Plan to ensure that the Missouri River's waters would be put to their best use. Congress fully supported that objective and repeatedly expressed the importance of maintaining flexible programs that would utilize the Missouri River's waters to meet the basin's evolving needs. For example, the House Report states (H.R. Rep. 1309, *supra*, at 24):

> [T]he committee is of the opinion that the works recommended by the Chief of Engineers will form a broad framework for the comprehensive development of the entire Missouri River Basin in the interest of flood control, irrigation, power development, navigation and other purposes and that the adjustment of the water use to meet the changing needs of the Missouri River Basin as a whole can and will be made if the comprehensive development proceeds step by step toward ultimate accomplishment.

See note 41, *supra*.[54] The Senate, in its debate, fully agreed on the need for flexibility, and established, in

---

[54] See also, *e.g.*, 90 Cong. Rec. 4132 (1944) (Rep. Curtis) ("The proposed plan is subject to modification as conditions warrant or as a result of further studies now being prosecuted and to be prosecuted in the future."); *id.* at 4133 (Rep. Curtis) ("The report of the Army engineers * * * is submitted * * * as a flexible plan, designed with the thought that all problems, controversies, and differences among localities, agencies, and individuals cannot be solved in advance, that by cooperation and coordination of effort between the agencies, needed changes can be made in the future."); *id.* at 4214 (Rep. Mansfield (Mont.)) ("There is no reason why a sound, well integrated economy cannot be equitably worked out between the Army engineers and the Bureau of Reclamation so that the waters of the Missouri and the Yellowstone can be utilized to their fullest extent, first, for domestic purposes, such as irrigation, mining, industrial and municipal uses, and then for flood control and navigation."); *id.* at 4218 (Rep. Hoeven (Iowa)) ("By these proposed improvements not only would large flood damages be prevented * * * but also floodwater would be retained for their [*sic*] best uses for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation."); *id.* at 4224 (Rep. Carlson (Kan.)) ("During the testimony before the committee * * * it

addition, a federal policy that navigational uses should not conflict with beneficial consumptive uses in states lying west of the 98th meridian. FCA § 1(b), 58 Stat. 889.[55]

Congress plainly understood that the Army and the Interior Department could provide the most effective utilization of the Missouri River's waters through a functional division of authority over the Pick-Sloan program's multiple purpose reservoirs. While only one agency can conduct the day-to-day operation of a reservoir, both agencies can and should participate in the multiple purpose management scheme. The Corps of Engineers, which has extensive experience in improving waters for navigation and flood control, is clearly best equipped to determine how multiple-purpose reservoirs should be administered to meet those needs. Similarly, the Bureau, which has extensive experience in delivering water for irrigation and allied uses, is best situated to determine how those reservoirs should be administered for reclamation purposes. The Pick-Sloan Plan's division of authority takes full advantage of each agency's particular expertise. There is no reason why this sensible approach should not be applied to administration of stored water

---

was brought out that the entire program was flexible and the final construction of it would be through a coordinated policy approved by the Federal, State, and local areas."); *id.* at 9284 (Rep. Curtis).

[55] See 90 Cong. Rec. 8376 (1944) (Sen. Overton) ("Modifications must be made wherever necessary, and I think it would be a very unsound thing for the Congress to authorize the development of any basin and not give authority to those entrusted with the development to make such minor modifications as may be necessary."); *id.* at 8547 (Sen. Millikin (Colo.)) ("[W]e have no crystal bowl [*sic*] here which we can use to foresee the future and we certainly do not want to preclude any industrial development which it might be possible to bring about."); see also *id.* at 8544 (Sen. Overton) ("When a comprehensive plan is adopted in connection with the recommendations of the engineers, the provision that the Chief of Engineers may make modifications becomes a part of the law without being so expressed in the statute.").

at the Missouri River mainstem reservoirs. A functional division of authority over reservoir storage is not only consistent with Section 9 of the Flood Control Act (see pages 23-34, *supra*), it also promotes the optimal utilization of the basin's water resources.

The situation at Lake Oahe demonstrates that point. As the Corps-Bureau coordinating report explains, the Army and Interior agreed to a reservoir design that would satisfy the needs of both agencies. See S. Doc. 247, *supra*. A large capacity reservoir, impounding approximately 19.6 million acre-feet of water, was selected primarily to provide the Bureau with irrigation water for the James River Basin (*id.* at 3; S. Doc. 191, *supra*, at 115-116 (see note 29, *supra*)), and the final capacity of 23.34 million acre-feet, was selected following the agencies' more detailed assessment of their needs. But as a result of the postponement or abandonment of planned irrigation projects, Interior's anticipated water needs at Lake Oahe for irrigation purposes have not yet materialized. In these circumstances, Interior is the logical agency to determine the best use for the resulting unutilized supply.

First, Interior, through its Bureau of Reclamation, determined Lake Oahe's irrigation storage capacity and is thus intimately familiar with the total amount of water stored for reclamation purposes. Second, it designed the discontinued irrigation works and thus is best situated to determine the amount of water that is presently available for alternative use. Third, as the federal agency generally responsible for reclamation activities, it can best forecast the duration of water availability in light of anticipated future reclamation needs, select among the alternative reclamation applications, and specify appropriate conditions that will attach to the resulting water service contracts. In short, Interior is the agency best suited to determine how to put the available water here to its optimal use.[56]

---

[56] The Interior Department must, of course, coordinate its water marketing decisions with the Army, which has its own water

Thus, the Secretary's exercise of marketing authority is not only consistent with the basic terms of the Flood Control Act, it also comports with the fundamental congressional policy that the Pick-Sloan program would be administered flexibly to assure that the Missouri River's waters are put to their most beneficial use. The court of appeals' conclusion that the Secretary is forbidden from utilizing Lake Oahe's waters because he had not yet built physical irrigation works at the facility (Pet. App. 20a) cannot be squared with that policy. There is no plausible reason why Congress would have wished to condition the Secretary's power to promote optimal utilization of water resources on the presence or absence of presently unneeded irrigation canals.

The court of appeals suggests that its result does not "leave the irrigation storage in Oahe without an agency to administer it" because the "Secretary of the Army retains the authority, pursuant to Section 6 of the [Flood Control] Act to use any surplus water in Army-controlled reservoirs for domestic or industrial purposes" (Pet. App. 29a n.20).[57] It is far from clear, however, that the Secretary of the Army can fill the Secretary of the Interior's shoes.[58] More importantly, the court's citation to the

---

marketing authority under Section 6 of the Flood Control Act. But Interior has always recognized that responsibility (see J.A. 147-151) and it followed that practice in this case (see J.A. 212-223).

[57] Section 6 provides in relevant part that the Secretary of the Army "is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water * * *" (58 Stat. 890). See notes 11, 15, 17, *supra*.

[58] While the legislative history makes clear that Section 6 was intended to grant the Army authority comparable to that exercised by the Interior Department under the reclamation laws (90 Cong. Rec. 4134 (1944) (Rep. Whittington)), the Army, in the past, has defined "surplus water" as "water trapped or stored in a reservoir project which is not utilized to fulfill an authorized project purpose." Army Project Purpose Planning Guidance Reg.

Army's authority misses the point. The Army and the Interior Department can best administer the multiple purpose reservoirs if *both* agencies have authority to supply unneeded water to its best possible uses. The Army and the Interior Department should be allowed to determine, through consultation and coordinated review, which agency is best suited to supply water in light of the Pick-Sloan Plan's functional division of authority and the particular circumstances presented. This approach not only is consistent with congressional intent and maximizes the effectiveness of the multiple purpose reservoirs, it also reduces federal-state tensions in those cases where a state may prefer that one federal agency, rather than another, dispense water within its borders.[59]

1105-2-20, § 7.3(c) (Jan. 29, 1982). See J.A. 209-210. Under that definition, water stored at mainstem reservoirs that can be used for hydropower purposes would not be considered surplus water, even though it might be put more profitably to industrial use. Thus, the lower basin states contended in their second amended complaint (at paras. 100-101) that the Army—as well as Interior—lacked authority to market water from Oahe because the water stored there was not "surplus." The Army's General Counsel recently determined that such water, in certain circumstances, may be termed "surplus." See Memorandum from Susan J. Crawford, Gen. Coun., Dep't of the Army, to the Assistant Secretary of the Army (Civil Works), *Proposed Contracts for Municipal and Industrial Water Withdrawals from Mainstem Reservoirs* (Mar. 13, 1986). To date, however, the Army has not treated the unutilized water stored, but not used, for irrigation purposes at Lake Oahe as "surplus." Furthermore, the financial effect of Army marketing is quite different from that of Interior marketing. The proceeds received by the Army are deposited in the Treasury as miscellaneous receipts (FCA § 6, 58 Stat. 890) while the proceeds received by the Interior Department are applied toward repayment of the reclamation features of the Pick-Sloan program. See pages 42-44, *infra*.

[59] Section 8 of the Reclamation Act of 1902, 32 Stat. 390 (43 U.S.C. 383), specifically requires that the Secretary of the Interior proceed in conformity with state laws regarding appropriation and beneficial uses of water, unless such laws are inconsistent with congressional directives concerning the project. See generally *California* v. *United States*, 438 U.S. 645 (1978). The Corps is

B. *The Administration of the Pick-Sloan Facilities*

The Secretary of the Interior's interpretation of Section 9 of the Flood Control Act is further supported by the established practices that have consistently governed the administration of the Pick-Sloan program. Those practices, which date back to the approval of the Pick-Sloan Plan, illustrate that the Army and the Interior Department have long recognized that each agency plays an important role at each facility based on the functions that the facility is designed to fulfill. The functional division of authority is apparent in both the operational and the financial elements of the Pick-Sloan management scheme.

As Congress recognized, only one agency can be responsible for the day-to-day operations at each particular Pick-Sloan facility. See 90 Cong. Rec. 8315 (1944) (Sen. Overton). The Army and the Interior Department, following the "dominant interest" criterion set forth in the Pick-Sloan Plan,[60] divide that responsibility on the basis of which agency constructed and has a dominant interest in the facility; the Corps of Engineers operates the Corps-constructed mainstem facilities and the Bureau of Reclamation operates the Bureau-constructed tributary facilities. But this division of operational authority does not foreclose the Bureau from administering the reclamation aspects of Corps-operated facilities, nor does it prevent the Corps from regulating the flood control aspects of Bureau-operated facilities. The Corps and the Bureau

---

not subject to any similar generic statutory mandate, although the directive in Section 1(b) and the proviso in Section 6 of the Flood Control Act impose some restrictions in this regard. Thus, the arid and semi-arid states may prefer that the Interior Department, rather than the Army, administer water resource programs within their borders. Congress was acutely aware of this difference when it passed the Flood Control Act (see, *e.g.*, 90 Cong. Rec. 4134 (1944) (Rep. Curtis); *id.* at 4140 (Rep. Burdick); *id.* at 8617 (Sen. Murray)) and the functional division of authority expressed in that Act reflects a sensitivity to that concern.

[60] See S. Doc. 191, *supra*, at 3-4, 11; H.R. Doc. 475, *supra*, at 3-4, 7. See also note 44, *supra*.

closely coordinate their activities at each facility; indeed, that has been the practice since the inception of the program.[61]

The Corps and the Bureau jointly develop the actual operating criteria at applicable facilities based on their respective functions. For example, the Corps operates the mainstem reservoirs under criteria that ensure that water storage is sufficient to meet Interior's reclamation needs, and the Bureau operates tributary reservoirs under criteria that satisfy the Army's flood control requirements. The Army and the Interior Department have successfully operated the Pick-Sloan facilities on this basis for more than 30 years. This functional approach ensures that each facility serves as an integrated element of a fully unified and jointly administered program; indeed, it would not be possible, as a practical matter, to operate the facilities in any other way.[62]

---

[61] Shortly after the Pick-Sloan Plan was authorized, the Corps organized the Coordinating Committee on Missouri River Main Stem Reservoir Operations. See *1957 Senate Hearings* 419-432. This committee, which included representatives from various federal agencies and the affected states, ensured that reservoir operations accommodate federal and state interests "insofar as possible and consistent with the authorizations of the projects" (*id.* at 421). See U.S. Army Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual*, at VI-4 to VI-5 (1979). The Committee's coordinating functions are now carried out through semi-annual meetings and through informal Corps-Bureau consultations.

[62] Respondents (Mo. Br. in Opp. 10-11) and the court of appeals (Pet. App. 22a n.15) suggest that there is no irrigation storage at Lake Oahe because the Army has not defined and set aside a specific block of water for Interior's irrigation use. That formalistic suggestion is without merit. The Army and Interior jointly designed that reservoir to impound massive amounts of water for irrigation (S. Doc. 247, *supra*, at 3; S. Doc. 191, *supra*, at 115-116). Indeed, the reservoir's overall capacity is more than three times the size originally proposed by the Corps for its purposes and more closely coincides with the size proposed by Interior in the Sloan Plan (see note 29, *supra*). The Army, in operating the reservoirs, classifies the total storage space on the basis of four general categories: (1) exclusive flood control storage; (2)

The same approach is reflected in the financial management of the Pick-Sloan facilities. The Pick-Sloan Plan, in keeping with the basic principles of reclamation law, contemplates that the reclamation costs of the program shall be recovered through revenues obtained from water service contracts and hydropower generation. See, *e.g.*, S. Doc. 191, *supra*, at 1-2, 11, 22; see also, *e.g.*, 90 Cong. Rec. 8549 (1944) (Sen Hayden); *H.R. 4485 Senate Hearings* 210 (Commissioner Bashore); *id.* at 672 (Sen. Millikin).[63] The cost recovery requirements are applicable

---

annual flood control and multiple-use storage; (3) carry-over multiple use storage; and (4) inactive storage. U.S. Army Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual*, at V-1 to V-2 (1979). See also Guhin, *supra*, S.D. L. Rev. at 411-420. The "multiple use" categories, which contain 16.79 million acre-feet of storage, include water available for irrigation as well as other multiple use purposes. See 128 Cong. Rec. 16609 (1982) (Letter from Maj. Gen. Heiberg to Sen. Moynihan, Table II). Indeed, Colonel Reber explained the practical difficulties of defining more specific storage allocations to the Senate Flood Control Committee in 1944. See *H.R. 4485 Senate Hearings* 728-730. Plainly, Interior does not lose its authority over water available for irrigation simply because the Army classifies it, for operational purposes, as part of the water available for multiple purposes.

[63] The federal reclamation laws, as a basic principle, envision that the cost of constructing reclamation facilities shall be repaid over time by the project beneficiaries. See Reclamation Project Act of 1939, § 9, 43 U.S.C. 485h. See generally, J. Sax, *Federal Reclamation Law* in 2 *Waters and Water Rights* at 111 (R. Clark ed. 1967). The Pick-Sloan Plan further refines that principle by requiring that the repayment provisions of the reclamation laws shall be applied on the basis of "basin-wide findings and recommendations regarding the benefits, the allocations of costs, and the repayments by water users" contained in the plans (§ 9(c), 58 Stat. 891). Thus, the benefits, costs, and repayment schedules are determined on the basin-wide plan for ultimate development, rather than on facility-specific calculations. See, *e.g.*, *Western Area Power Administration (Pick-Sloan Project); Order Confirming and Approving Rate Schedules, Noting Interventions, and Denying Request for Hearing*, 49 Fed. Reg. 6986 (1984). See also *S. 1915 Hearings* 40 (Mr. Sloan) ("The plan must be considered as one project for the whole basin. Any time you break it down into

to *all* facilities that contribute to reclamation, regardless of who constructed or operates them. Thus, irrigators are required to repay that portion of mainstem reservoir construction costs allocable to irrigation, including both the cost of providing irrigation storage and the cost of providing power for irrigation pumping, that is within their power to repay. See *ibid.* These financial requirements recognize that the mainstem reservoirs, like Lake Oahe, are hybrid facilities in the sense that they are dedicated to both Army and Interior functions.

The financial management of Pick-Sloan hydropower revenues specifically illustrates this point. The Pick-Sloan Plan provides that hydropower revenues from both the mainstem and tributary facilities shall be applied to recover the cost of power production and, in addition, other program costs including irrigation costs beyond the irrigators' ability to repay. See S. Doc. 191, *supra*, at 11, 25. The Army and Interior (as well as the Department of Energy, which presently administers the Pick-Sloan facilities' hydropower marketing program [64]) have long adhered to this financing requirement even at those reservoirs, like Lake Oahe, where Interior has not yet put water stored for irrigation purposes to irrigation use.[65] Lake Oahe operations accordingly contribute to

---

individual projects * * * you run into trouble in allocating the benefits of these various large multiple-purpose features of the plan."). See generally Guhin, *supra*, 30 S.D. L. Rev. at 366-372.

[64] See Department of Energy Organization Act § 302(a)(1)(E), 42 U.S.C. 7152(a)(1)(E); see generally *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 4-6.

[65] See *Western Area Power Administration*, 49 Fed. Reg. 6987 (1984); *Western Area Power Administration Pick-Sloan Missouri Basin Program; Submission of Rate Order*, 47 Fed. Reg. 31738, 31740-31743 (1982); *1957 Senate Hearings* 344-353, 443-447. The Interior Department noted that practice 30 years ago, stating, "Actually, if the power revenues are not made available for aid to irrigation the proposed irrigation developments would not be feasible. Therefore, most of the irrigation would have to be left out of the project and this would require that a new cost allocation be made for the main stem reservoir system to reallocate to

reclamation financing, even though Interior has not constructed irrigation works at that reservoir.[66]

Thus, the court of appeals' treatment of the Pick-Sloan program as a series of autonomous Army and Interior Department projects is flatly inconsistent with the operational and financial character of the program. The Army and the Interior Department jointly administer the Pick-Sloan program as a single basin-wide development that is fully integrated, from both an operational and a financial perspective, to serve both Army and Interior functions. The court's conclusion that the Secretary of the Interior can market irrigation water only from those reservoirs that he has constructed runs directly contrary to that principle and cannot be squared with the established practices that have long governed the Pick-Sloan program.

III. The Secretary Of The Interior's Interpretation Of Section 9 Of The Flood Control Act Is Entitled To Deference From The Courts

As the foregoing discussion demonstrates, Section 9 of the Flood Control Act, by its own terms and by necessary implication, authorizes the Secretary of the Interior to provide unutilized irrigation water from mainstem reser-

---

other project purposes, including power, the costs now allocated to irrigation" (*id.* at 446).

[66] The power rates for the midwestern states are based on the Pick-Sloan cost allocation principles and specifically include a suballocation reflecting that the proceeds from power intended but not used for irrigation pumping are credited toward interest-free repayment of basin-wide irrigation costs. See Western Power Administration, *Pick-Sloan Missouri Basin Program Power Rate Adjustment Customer Brochure* 28 (June 1984); 49 Fed. Reg. 6987 (1984); 47 Fed. Reg. 31742-31743 (1982); *1957 Senate Hearings* 446. The Interior Department's water marketing program follows the same pattern; the proceeds from providing irrigation water for industrial use are applied to defray ultimate irrigation costs. See J.A. 221. As we have noted (see note 58, *supra*), if the Army were to market available irrigation water under Section 6 of the Flood Control Act, the revenues would be deposited in the Treasury as miscellaneous receipts rather than credited toward repayment of irrigation costs. See 58 Stat. 890.

voirs for industrial use. But even if there were any doubt, the Secretary's construction of the statute should control. It is well settled that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted).[67] The agency's construction must be given effect unless the interpretation is inconsistent with a clearly expressed legislative intent. See *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11.[68] The Secretary's construction of Section 9 of the Flood Control Act amply meets that test. Indeed, the Secretary's construction is entitled to especial deference in this instance.

The Flood Control Act of 1944 is written in unusually broad language that vests the responsible agencies with extraordinarily broad discretion. Congress plainly intended to give those agencies extensive latitude in designing, constructing and administering the complex public works projects authorized in this legislation. See *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986).[69]

---

[67] See, *e.g.*, *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11; *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-7; *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 13; *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714 (1985); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 126 (1985).

[68] See also, *e.g.*, *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714 (1985); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 126 (1985).

[69] In *Fulton*, this Court held that Section 5 of the Flood Control Act, which governs hydropower generation, vests the Secretary

Such delegations are common in the case of public works projects. For example, this Court stated with respect to the Flood Control Act of 1928 (ch. 569, 45 Stat. 534):

> Since it envisaged a vast program, the Act naturally left much to the discretion of its administrators and future decisions of Congress. Recognizing the value of experience in flood control, Congress and the sponsors of the Act did not intend it to foreclose the possibility of changing the program's details as trial and error might demand.

United States v. *Sponenbarger*, 308 U.S. 256, 268 (1939) (footnote omitted). Congress's repeated expressions of the need for flexibility in administering the Pick-Sloan program (see pages 35-36, *supra*) specifically demonstrate that point in the present case.

The Secretary of the Interior is further entitled to deference because the Interior Department was intimately involved in the creation of the legislative program. See *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549 (1940). "Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." *Youakim*, 440 U.S. at 144. In this instance, Congress, through its approval of the Pick-Sloan Plan, ratified a functional division of authority that was formulated by the Interior Department and the Army. The Secretary of the Interior's interpretation of that division of authority, which the Army considers acceptable, is therefore entitled to great weight. See *Adams* v. *United States*, 319 U.S. 312, 314-315 (1943). Indeed, in a very real sense, the issue in this case has been

---

of Energy with broad latitude in establishing administrative procedures for ratemaking, stating that "Congress, in declining to set out a detailed mandatory procedural scheme, apparently intended to leave the agency substantial discretion as to how to structure its review" (slip op. 12). The Secretary of the Interior is entitled to even greater deference in determining the best manner for the actual management of the program, an area, unlike questions of administrative procedure, where the courts have no practical experience or expertise.

resolved, as Congress intended, within the Executive Branch.[70]

The Secretary's interpretation is also entitled to deference because the Interior Department has consistently adhered to the present interpretation since the inception of the Pick-Sloan program. See *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Solicitor's opinion expressing the present interpretation is now more than 12 years old (see J.A. 120-127) and the Interior Department's prior practices in administering the Pick-Sloan Plan are all consistent with the Secretary's present interpretation (see pages 40-44, *supra*). There is no reason to doubt that Secretary Ickes and Commissioner Bashore fully expected that approval of the Pick-Sloan Plan would give the Bureau of Reclamation authority over water stored for irrigation at the mainstem reservoirs.[71] Thus, the

---

[70] As we have noted (see note 32, *supra*), the Army's Acting General Counsel recommended that the Army cooperate with Interior's mainstem water marketing program, but observed that Interior "may not market the water from these reservoirs independently" (J.A. 135 n.*). That qualification did not imply that Interior lacked statutory authority to supply irrigation water to industrial users; it signified only that Interior's actions must be coordinated with the Army to ensure that they do not "interfere with the operation of the reservoirs for flood control" (J.A. 135).

[71] That is, of course, what the Pick and Sloan plans specifically state (see pages 24-27, *supra*). Indeed, Secretary Ickes had sought even broader authority, urging in hearings preceding passage of the Flood Control Act, that Section 4 of the House bill (which would become Section 6 of the Act) include a proviso to "assure that the disposition of water for domestic and industrial purposes, from reservoirs serving irrigation purposes as well, * * * be handled pursuant to the Federal reclamation laws." *H.R. 4485 Senate Hearings* 312-313; see notes 15, 17, *supra*. This amendment would have greatly expanded the Interior Department's powers by giving the Bureau of Reclamation *exclusive* authority to supply water for domestic and industrial purposes at *all* Corps-constructed facilities. See *H.R. 4485 Senate Hearings* 457-458. Congress did not accept the Secretary's proposal, but *did* give him the specific

Secretary's interpretation rests upon a longstanding and consistent view of the Interior Department's role in administering the Pick-Sloan program.

Finally, Congress has been fully informed of the Secretary's practice of providing water from mainstem reservoirs and has expressed no dissatisfaction with the Secretary's exercise of that authority, even while making other changes in the law.[72] Although we do not place great

---

authority, through approval of the Pick-Sloan Plan, to supply water from the Missouri River's mainstem reservoirs.

Secretary Ickes also proposed simultaneous changes to Section 6 of the House bill (which would later become Section 8 of the Act) that authorized the Secretary to add irrigation features to Corps-constructed reservoirs. See *H.R. 4485 Senate Hearings* 313, 458-459; see also notes 15, 17, *supra*. The Secretary described these changes as "technical" (*H.R. 4485 Senate Hearings* 313) and "purely for purposes of clarification" (*id.* at 458), but the court of appeals nevertheless concluded (Pet. App. 26a-27a) that they reflect an intention by the Secretary to *limit* his authority at those facilities. That inference is, of course, plainly unreasonable; the Secretary would not have sought to paralyze with one hand what he sought to promote with the other. Cf. *Escondido Mutual Water Co.* v. *La Jolla Indians*, 466 U.S. 765, 773 (1984). As we have explained (see note 45, *supra*), Section 8 does not address the Secretary's authority to supply water from Pick-Sloan facilities.

[72] The Interior Department and the Army described their mainstem water marketing activities to Congress in the course of its consideration of the Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, 96 Stat. 1263-1274. Commissioner of Reclamation Broadbent specifically noted that Section 212(b) of the Act (codified at 43 U.S.C. 390*ll*(b)), which preserved existing repayment requirements at Corps-constructed dams (including Lake Oahe) would "assure that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way." 128 Cong. Rec. 16607 (1982) (letter from Comm'r Broadbent to Sen. Moynihan). General Heiberg of the Corps noted that the Missouri River mainstem reservoir costs are allocated, in part, to irrigation and that a "portion of the mainstem storage space set aside for irrigation has been contracted for by industrial water users for interim water supplies" (*id.* at 16611 (letter from Gen. Heiberg to Sen. Moynihan)). As we have observed (see note 33, *supra*), Congress held extensive hearings on the Interior Department's water marketing program shortly after its inception in

weight on congressional inaction, Congress's failure to act does weigh in favor, rather than against, deference to the Secretary's interpretation. See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 15.[73]

Thus, we believe that the court of appeals seriously erred in holding that the Secretary's interpretation is "beyond his statutory mandate and therefore not entitled to judicial deference" (Pet. App. 33a-34a (footnote omitted)). The court's determination that the Secretary lacks "jurisdiction to decide" (*id.* at 33a) whether or not he may enter into water service contracts is plainly wrong. The Secretary *must* answer that question, either affirmatively or negatively, in carrying out his responsibilities under the Pick-Sloan Plan. And this Court has decisively rejected the notion that an agency's answer to such questions, which involve the scope of an agency's administrative authority, is not entitled to deference.[74] The Sec-

---

1974 (see *1975 Industrial Water Marketing Hearing*) and took no action suggesting that the Secretary's exercise of this authority is improper. And as we noted (page 29, *supra*), a 1955 Senate report supporting legislation modifying the Pick-Sloan Plan expressly acknowledged the authority the Secretary asserts here, stating "the Secretary of the Interior is responsible for the disposal of water for irrigation *or space reserved for this purpose in any of the dams in the Missouri River Basin project*, while the Secretary of the Army is responsible for flood-control regulation." S. Rep. 1066, 84th Cong., 1st Sess. 3 (1955) (emphasis added).

[73] See also *CFTC* v. *Schor*, No. 85-621 (July 7, 1986); *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 9; *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 11; *Haig* v. *Agee*, 453 U.S. 280, 301 (1981); *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 410 (1975); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969).

[74] See *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 11 (giving deference to the CFTC's determination that it may entertain state law counterclaims in reparation proceedings, despite the "'statutory interpretation-jurisdictional' nature of the question at issue"); *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-

retary's determination that Section 9 of the Flood Control Act authorizes him to enter into the ETSI water service contract is fully entitled to deference from the courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

FRED R. DISHEROON
KATHLEEN P. DEWEY
Attorneys

RALPH W. TARR
Solicitor

LOUIS D. MAURO
Senior Attorney
Department of the Interior

SUSAN J. CRAWFORD
General Counsel
Department of the Army

MAY 1987

---

701 (Dec. 4, 1985), slip op. 9-13 (giving deference to the Corps' determination of its regulatory jurisdiction over wetlands). See also *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-7 (giving deference to the FDA's determination that it has no mandatory duty to promulgate aflatoxin regulations); *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11-12 (giving deference to the Secretary of Commerce's determination that he has no mandatory duty to sanction all foreign whale harvests in excess of international convention quotas).

ADDENDUM

STATUTES INVOLVED

Section 9 of the Flood Control Act of 1944, ch. 665, 58 Stat. 891, provides as follows:

> (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.
>
> (b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.
>
> (c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.
>
> (d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secreary of the Interior.

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), provides as follows:

> The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrifica-

tion Act of 1936 [7 U.S.C. 901 *et seq.* and any amendments thereof]. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition to and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 181483 40341

Nos. 86-939 and 86-941

Supreme Court, U.S.
FILED
JUL 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETSI PIPELINE PROJECT,
Petitioner,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR RESPONDENTS THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB AND THE IOWA AND NEBRASKA CHAPTERS OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA

WILLIAM E. WALTERS, III *
WALTERS & THEIS
2015 York Street
Denver, Colorado 80205
Attorney for the Iowa and Nebraska Chapters of the Farmers Educational and Cooperative Union of America

RODNEY M. CONFER
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
Of Counsel

STEPHEN E. ROADY *
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700
Attorney for The Kansas City Southern Railway Company

RONALD J. WILSON *
SIERRA CLUB LEGAL DEFENSE FUND
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
Attorney for The Sierra Club

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Flood Control Act of 1944, which explicitly authorizes only the Secretary of the Army to execute contracts for the industrial use of water from main stem Missouri River reservoirs, implicitly authorizes the Secretary of the Interior to enter into such contracts for the same use of the same water.

PARTIES TO THE PROCEEDINGS

A complete list of the parties to this proceeding is set out in the petitions for writs of certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
A. The Congressional Decisions In The Flood Control Act Of 1944 That Divided Federal Authority Over The Water Resources Of The Missouri River Basin Between The Army And Interior Departments	2
B. The Temporary Effort By Army And Interior During The 1970's To Engage In Industrial Water Marketing From Main Stem Missouri River Reservoirs	6
C. The Decisions Below That Enjoin The ETSI Contract	7
D. The Practical Implications Of This Case For Existing Users Of Missouri River Water	11
SUMMARY OF THE ARGUMENT	13
ARGUMENT	16
I. The Plain Language Of The Flood Control Act Of 1944 Exclusively Empowers The Secretary Of The Army To Control The Marketing Of Water From Main Stem Missouri River Reservoirs For Industrial Use	16

TABLE OF CONTENTS—Continued

Page

A. Section 6 Of The Flood Control Act Authorizes Only The Army To Contract For Industrial Use Of Water At Main Stem Reservoirs 16

B. Under Section 8 Of The Flood Control Act, The Reclamation Laws Do Not Apply To Army-Controlled Reservoirs Unless And Until Interior Completes Additional Works For Irrigation Purposes After Army Approval.. 18

C. Section 9 Of The Flood Control Act Incorporates The Reclamation Laws Only For Reclamation Developments To Be Undertaken By The Secretary Of The Interior 19

II. The Flood Control Act Of 1944 Does Not Authorize The Secretary Of The Interior To Execute The ETSI Industrial Water Service Contract 21

A. Section 9 Does Not Authorize The Interior Secretary To Market Water For Industrial Use At Oahe Reservoir 21

1. Section 9(a) Does Not, By Approving The Pick-Sloan Plan, Reserve Any Block Of Water For Interior Control..... 22

2. The ETSI Contract Is Not A Reclamation Development Undertaken Under The Pick-Sloan Plan Pursuant To Section 9(c) 26

B. Section 8 Applies Directly To The Missouri River Basin Projects Authorized In Section 9 and Limits Interior Authority At Those Projects Controlled By The Army Such As Oahe Reservoir 28

C. Section 6 Places The Authority To Define And Control "Surplus Water" Solely In The Army At Oahe Reservoir 32

TABLE OF CONTENTS—Continued

Page

1. The Army Has Sole Authority To Determine What Water Is "Surplus" And Available For Industrial Uses at Oahe.... 33

2. Concurrent Authority Over Industrial Uses Would Destroy The Congressional Division Of Authority At Main Stem Dams 35

III. The Legislative History Of The 1944 Act, As Well As Subsequent Actions Of The Congress, Confirm That The Interior Secretary Lacks The Authority He Seeks 36

A. Congress Rejected Efforts By The Interior Secretary And His Allies To Amend Section 6 And Obtain The Authority He Now Seeks During Deliberations Over The 1944 Act..... 37

B. Congress Designed Section 8 Of The 1944 Act To Avoid A Grant Of Authority To The Interior Secretary Over A Block Of Water Stored At Army Reservoirs 39

C. Congress Rejected Any Inference That Interior Could Exercise Control Over Army Reservoirs In The Absence Of Explicit Statutory Language Or The Construction Of Irrigation Works In The Reclamation Reform Act Of 1982 41

IV. The Interpretation Of The Flood Control Act Of 1944 Advanced By The Interior Secretary Is Not Entitled To Deference For The Reason That It Conflicts Squarely With The Act's Plain Language And Legislative History As Well As With Contrary Interpretations By The Army And By Interior Itself 43

CONCLUSION 50

TABLE OF CONTENTS—Continued

Page

APPENDICES

APPENDIX A—Sections 5 through 9 of the Flood Control Act of 1944 ..... 1a

APPENDIX B—Section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. § 485h(c)) 5a

APPENDIX C—Section 212 of the Reclamation Reform Act of 1982 (43 U.S.C. § 390*ll*) 7a

APPENDIX D—Act of February 25, 1920 (43 U.S.C. § 521) 8a

APPENDIX E—March 13, 1986 Opinion of Susan J. Crawford, General Counsel of the Army 9a

APPENDIX F—March 24, 1987 Memorandum From Robert K. Dawson, Assistant Secretary of the Army..... 16a

APPENDIX G—*Environmental Assessment for the Water Intake Permits, Easements and Municipal Water Service Contract related to the ETSI Pipeline and South Dakota Municip·l Water Survey,* U.S. Army Corps of Engineers, June 1982 (excerpts only) 19a

APPENDIX H—S. Rep. No. 97-373, 97th Cong., 2d Sess. (1982) (excerpts only).. 21a

TABLE OF AUTHORITIES

Cases	Page
Botany Worsted Mills v. United States, 278 U.S. 282 (1929)	17
Chemical Manufacturers Ass'n v. Natural Resources Defense Council, 470 U.S. 116 (1985)	45
Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984)	43
Commodity Futures Trading Comm'n v. Schor, 106 S.Ct. 3245 (1986)	45, 49
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	49
County of Los Angeles v. Davis, 440 U.S. 625 (1979)	10
Environmental Defense Fund v. Morton, 420 F. Supp. 1037 (D. Mont. 1976), *aff'd in part and rev'd in part sub nom. Environmental Defense Fund v. Andrus*, 596 F.2d 848 (9th Cir. 1979)	31
Federal Deposit Insurance Corp. v. Philadelphia Gear Corp., 106 S.Ct. 1931 (1986)	45
Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973)	48
Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974)	38
Interstate Natural Gas Co. v. FPC, 156 F.2d 949 (5th Cir. 1946), *aff'd*, 331 U.S. 682, *reh'g denied*, 332 U.S. 785 (1947)	40
Immigration and Naturalization Service v. Cardoza-Fonseca, 107 S.Ct. 1207 (1987)	36, 41, 47, 48
Japan Whaling Association v. American Cetacean Society, No. 85-954 (U.S. June 30, 1986)	43
Kosak v. United States, 465 U.S. 848 (1984)	23
Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979)	49
National Automatic Laundry and Cleaning Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971)	38

TABLE OF AUTHORITIES—Continued

	Page
Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)	49
Park 'N Fly v. Dollar Park and Fly, 469 U.S. 189 (1985)	16
Pan Am World Airways v. CAB, 380 F.2d 770 (2d Cir. 1967), *aff'd*, 391 U.S. 461, *reh'g denied*, 393 U.S. 957 (1968)	41
Powell v. McCormack, 395 U.S. 486 (1969)	9
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, *reh'g denied*, 341 U.S. 956 (1951)	23
Securities and Exchange Commission v. Sloan, 436 U.S. 103 (1978)	49
Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985)	49
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)	49
United States v. City of Fulton, 106 S.Ct. 1422 (1986)	45
United States v. Clark, 454 U.S. 555 (1982)	16
United States v. Morton, 467 U.S. 822, *reh'g denied*, 468 U.S. 1226 (1984)	44
United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)	45
United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121, *reh'g denied*, 430 U.S. 976 (1977)	32
United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)	23
United States ex rel. Chapman v. Federal Power Commission, 345 U.S. 153 (1953)	23
United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)	9
Van Dyke v. Cordova Copper Co., 234 U.S. 188 (1914)	44
Statutes and Regulations	
Act of August 3, 1968, Pub. L. No. 90-453, 82 Stat. 624	19

TABLE OF AUTHORITIES—Continued

Page

Act of February 25, 1920, 43 U.S.C. § 521 ..... 1, 28, 36
Act of July 24, 1946, Pub. L. No. 79-526, 60 Stat. 653 28
Act of September 30, 1982, Pub. L. No. 97-273, 96 Stat. 1181 19
Federal Power Act, 16 U.S.C. § 796(11) (1920) 27
Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 837 ..... *passim*
Section 1, 58 Stat. 887 34
Section 5, 58 Stat. 890 ..... 1, 5, 45
Section 6, 58 Stat. 890, 33 U.S.C. § 708 (1982) ..... *passim*
Section 7, 58 Stat. 890-91, 33 U.S.C. § 709 (1982) 1, 5, 30
Section 8, 58 Stat. 891, 43 U.S.C. § 390 (1982) ..... *passim*
Section 9, 58 Stat. 891 ..... *passim*
Section 9(a), 58 Stat. 891 ..... 14, 20, 22, 25, 27
Section 9(b), 58 Stat. 891 ..... 20, 29
Section 9(c), 58 Stat. 891 ..... *passim*
Section 9(e), 58 Stat. 891 27
Section 10, 58 Stat. 891 ..... 29, 30
Pub. L. No. 99-662, Section 931, 100 Stat. 4196, 43 U.S.C. § 390 (1987) 18
Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 27
Reclamation Project Act of 1939, 43 U.S.C. § 485 *et seq.* 1, 27, 28
Section 9(c), 43 U.S.C. § 485h(c) ..... *passim*
Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261 ..... 1, 32, 37, 41, 46, 47
Section 202(5), 43 U.S.C. § 390bb(5) 42
Section 212(a), 43 U.S.C. § 390*ll*(a) 32, 42, 49
Section 212(b), 43 U.S.C. § 390*ll*(b) 42
Water Supply Act of 1958, 43 U.S.C. § 390(b) 9
1978 S.D. Session Laws Ch. 333, codified at S.D.C.L. § 46A-1-78 19

TABLE OF AUTHORITIES—Continued

Congressional Materials and Miscellaneous Page

A.S. Goodman, *Principles of Water Resources Planning* (1984) 7
Black's Law Dictionary, 5th ed. (1979) 30
66 Cong. Rec. 2980 (1920) 28
90 Cong. Rec. (1944) 2
pp. 4119-4232 2
p. 4122 31
p. 4124 3
p. 4125 44
p. 4133 33
p. 4133-34 30
p. 4134 ..... 33, 38, 44
p. 4142 3
p. 4197 38
p. 8231 ..... 3, 33, 35, 44
pp. 8231-8431 2
p. 8233 40
pp. 8233-8241 39
p. 8245 5
pp. 8250-51 4
pp. 8314-15 40
p. 8315 5
p. 8479 4
pp. 8485-8501 2
pp. 8540-8668 2
p. 8548 34
pp. 8548-49 30
pp. 8552-8553 30
p. 8616 38
p. 8625 5
pp. 8625-26 40
p. 8626 38
p. 8674-75 40
p. 8675 37
pp. 9259-9269 2
pp. 9277-9287 2
p. 9279 ..... 3, 39
p. 9282 5
p. 9284-85 30

TABLE OF AUTHORITIES—Continued

	Page
98 Cong. Rec. (1952)	35
pp. 3801-02	38
p. 3802	35
128 Cong. Rec. (1982)	31
p. 16607	42
p. 16610	31
pp. 16612-13	32
p. 16614	46
49 Fed. Reg. 30223-24 (July 27, 1984)	12
Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944)	3, 24, 28, 31, 37, 40
Flood Control Plans and New Projects: Hearings on H.R. 4485 Before the House Comm. on Flood Control, 78th Cong., 1st Sess. (1943 and 1944)	3, 24, 25, 27, 47
H.R. 4485, 78th Cong., 2d Sess. (1944)	2, 3, 47
H. Rep. 995, 76th Cong., 1st Sess. (1939)	27
H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944) (Pick Plan)	2, 20, 25
Memorandum for the Director of Civil Works, March 24, 1987	12
Missouri River Basin Industrial Water Marketing: Hearing Before the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. (1975)	49
Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works, 85th Cong., 1st Sess., Part 1 (1957)	48
1981-1982 *Missouri River Main Stem Reservoirs Annual Operating Plan*	13
M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan: A Case Study in Congressional Policy Determination* (1952)	2, 4
41 Op. Att'y Gen. 377 (1958)	32
Opinion of Army General Counsel, March 13, 1986	12, 34

TABLE OF AUTHORITIES—Continued

Page

Reclamation Reform Act of 1981: Hearings on S.1867 Before the Senate Comm. on Energy and Natural Resources, 97th Cong., 1st and 2d Sess. (1981-1982) 48

Rivers and Harbors Omnibus Bill, Missouri River Project, et al.: Hearing on H.R. 3961 Before a Subcomm. on the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944) 3

S. Doc. No. 247, 78th Cong., 2d Sess. (1944) (Pick-Sloan Report) 4, 25

S. Doc. No. 191, 78th Cong., 2d Sess. (1944) (Sloan Plan) 3, 20, 24, 27

S. Rep. No. 97-373, 97th Cong., 2d Sess. (1982) 32, 41, 42

BRIEF FOR RESPONDENTS THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB AND THE IOWA AND NEBRASKA CHAPTERS OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Pet. App. 1a-44a)[1] affirming the District Court is reported at 787 F.2d 270. The district court opinion (Pet. App. 45a-72a) is reported at 586 F.Supp. 1268.

STATUTES INVOLVED

Sections 5, 6, 7, 8 and 9 of the Flood Control Act of 1944, 58 Stat. 890-891, are set out in the Appendix to this Brief, as are the following additional statutes: Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c); the Act of February 25, 1920, 43 U.S.C. § 521; and Section 212 of the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll*.

STATEMENT OF THE CASE

In the Flood Control Act of 1944, Congress divided federal authority for the management of the waters in the Missouri River Basin between the Department of the Army ("Army") and the Department of the Interior ("Interior"). This division of authority was a purposeful effort by the Congress to protect existing users of water in the Basin and to achieve flood control and allow navigation along the main stem, while also allowing for irrigation. This case arises from the execution in 1982 of a water service contract by Interior that approved the withdrawal of water for industrial use from Oahe Reservoir, a main stem project located on the Missouri River.

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in this case by ETSI Pipeline Project (No. 86-939). Hereafter, "J.A." refers to the Joint Appendix, and "App." refers to the Appendix to this brief.

The Interior contract avoided the congressional division of authority under the 1944 Act, and ignored the protections built into the 1944 Act for those who use the waters of the Missouri.

A. The Congressional Decisions In The Flood Control Act Of 1944 That Divided Federal Authority Over The Water Resources Of The Missouri River Basin Between The Army And Interior Departments

During the hearings and debates on the Flood Control Act,[2] Congress endeavored to reconcile several Basin interests. Flood control, navigation and irrigation were the major interests to be accommodated. Intertwined in these concerns were the competing interests of Army's Corps of Engineers ("Corps") and Interior's Bureau of Reclamation ("Bureau") over the question of which agency would control development of the Basin's water resources. These interests in turn were reflected in the Army's Pick Plan (which suggested that Army construct a number of reservoirs in the Basin for flood control and other purposes) and Interior's Sloan Plan (which suggested that Interior construct numerous Basin reservoirs for irrigation and other purposes).[3] (Pet. App. 46a-47a.)

---

[2] The legislative vehicle for the decisions by the 1944 Congress concerning the Missouri River Basin was H.R. 4485, an Omnibus Flood Control Bill that was introduced on March 27, 1944 by House Flood Control Committee Chairman Will M. Whittington of Mississippi following detailed hearings that had commenced in June 1943. That bill, as amended later by the Senate, became the Flood Control Act of 1944. The key congressional debates attending consideration of the Act occurred in May and December 1944 in the House, and in November and December 1944 in the Senate. *See* 90 Cong. Rec. 4119-4232, 8231-8431, 8485-8501, 8540-8668, 9259-9269, 9277-9287 (1944). For an overview of the legislative developments leading to enactment of the Act, see *The Missouri Basin's Pick-Sloan Plan: A Case Study in Congressional Policy Determination*, 93-102, M. E. Ridgeway, Ph.D. Thesis, University of Illinois (1952). (Hereinafter cited as *"Ridgeway"*).

[3] The Pick Plan, which emphasized construction of reservoirs on the main stem of the Missouri for flood control and navigation, is contained in H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944); the

Thus, a central focus of Congress in formulating the Flood Control Act of 1944—indeed, at the very heart of the Act's purpose—was the careful division of responsibility between Army and Interior in a fashion that protected existing water users and also accommodated flood control, navigation and reclamation development. There was no dispute that existing lawful uses of main stem Missouri River water should be protected.[4] Likewise, there was universal agreement both in Congress and among the two agencies that duplication, or overlapping jurisdiction, was to be avoided.[5]

Sloan Plan, which emphasized the construction of reservoirs on tributaries to the Missouri for irrigation, is contained in S. Doc. No. 191, 78th Cong. 2d Sess. (1944).

[4] In introducing debate on the Act, Representative Whittington emphasized his intent to protect citizens in their "riparian privileges" and in "the enjoyment of their riparian rights." 90 Cong. Rec. 4124 (1944). The floor manager in the Senate, Senator Overton, stated the clear intention to protect existing lawful uses of water in connection with industrial water marketing from Army reservoirs. *Id.* at 8231. The Conference Report underscored that intention. *Id.* at 9279. And the Sloan Plan emphasized that releases from Oahe Reservoir on the main stem of the Missouri would be required to preserve municipal and sanitation uses downstream. S. Doc. 191 at 116.

[5] Congressional intent to avoid duplication was emphasized by the sponsor of H.R. 4485 himself in the hearings on the bill: "[t]here is no occasion for any controversy between agencies of the Government. There should be cooperation to provide for efficiency as well as economy and *prevent duplication.*" *Flood Control Plans and New Projects: Hearings on H.R. 4485 Before the House Committee on Flood Control*, 78th Cong., 1st Sess. (1943 and 1944) 107 (hereinafter "*House Hearings*") (remarks of Representative Whittington) (emphasis added). His colleagues echoed that intent. *See, e.g.*, 90 Cong. Rec. 4142 (remarks of Representative Case). Moreover, both Interior Secretary Harold Ickes and the Corps' Chief of Engineers agreed that duplication and overlap were to be avoided. *Flood Control: Hearings on H.R. 4485 Before a Subcommittee of the Senate Committee on Commerce*, 78th Cong., 2d Sess. (1944) 457 (hereinafter "*Senate Hearings*") (remarks of Secretary Ickes); *Rivers and Harbors Omnibus Bill: Hearings on H.R. 3961 Before a Subcommittee of the Senate Committee on*

The Pick and Sloan Plans were the two agency reports that provided background information on Missouri River Basin development for congressional deliberations. After H.R. 4485 passed the House, but before it was debated in the Senate, the Corps and the Bureau reconciled the differences between the two Plans. The resulting document was presented to Congress in November of 1944.[6]

Agreement between the Corps and the Bureau on the Pick-Sloan plan did not by itself resolve the questions pertinent to this case. The very general nature of the Pick-Sloan agreement was noted by President Roosevelt as well as members of the Congress.[7] Specifically, "[t]he agreement left to the Congress the problem of determining how and by whom the [Missouri] Valley's development should be administered." *Ridgeway* at 129. It was left for Congress to spell out the final details of the division of authority. Accordingly, the sponsors of the Act in the House and in the Senate clearly explained the intention of Congress to divide authority between the two agencies according to the primary purpose each project would serve: Army was to build and control the main stem dams for flood control and navigation, while Interior was to build and control dams on the tributaries for irrigation.[8]

Commerce, 78th Cong., 2d Sess. (1944) 1241-1242 (remarks of General Reybold).

[6] The joint Pick-Sloan agreement is contained in S. Doc. No. 247, 78th Cong., 2d Sess. (1944). Together, the Pick Plan, the Sloan Plan, and S. Doc. 247 constitute the "Pick-Sloan plan."

[7] 90 Cong. Rec. 8479 (1944) (letter from President Roosevelt to the Senate stating that the joint plan was "only a beginning," and urging the creation of a single authority over the entire Basin to provide for development); *id.* at 8250-51 (remarks of Senator Murray characterizing the joint plan as merely an "engineering agreement").

[8] The chief sponsors of the Act, in both chambers, emphasized the division of authority: "Someone must have control of a dam. If it is a flood control or navigation dam, the Secretary of War has charge of it, and if it is an irrigation dam, the Secretary of the

As finally enacted, the Flood Control Act of 1944 protected existing uses of water and settled the question of authority between Army and Interior over the water resources of the Missouri River Basin by spelling out a careful division according to the function which the water was to serve. In Sections 5, 6, 7, 8 and 9 of the 1944 Act, the Congress divided authority between the two agencies on the following bases:

(1) To the Army Secretary, the Congress granted the authority to construct and operate five dams[9] on the main stem of the Missouri River (Section 9), to develop regulations for flood control and navigation purposes at all dams (Section 7), to allow Interior to construct and operate irrigation works adjacent to Army-controlled dams where the Army concluded irrigation was possible (Section 8), and to enter into contracts for the use of surplus water at Army dams for domestic or industrial purposes so long as existing water uses were protected (Section 6).

(2) To the Interior Secretary, the Congress granted the authority to construct and operate under the reclamation laws dams on the tributaries of the Missouri River (Section 9), to market the hydropower generated at any dam constructed by the Army (Section 5), and to construct irrigation works at the dams constructed by the Army following Army approval (Section 8).

This division of authority set out so carefully by the Congress in the 1944 Act vested authority solely in the Army to control industrial water marketing from the main stem dams. During deliberations over the Act, In-

---

Interior has charge of it." 90 Cong. Rec. 8315 (1944) (remarks of Senator Overton); *accord id.* at 8245, 8625; "The works that are predominantly flood control shall be constructed by the Chief of Engineers, and the works that are predominantly reclamation shall be constructed by the Bureau of Reclamation." *Id.* at 9282 (remarks of Representative Whittington).

[9] The Army already was vested with authority to operate a sixth dam it had constructed on the main stem (Fort Peck).

terior and its allies in the Congress attempted unsuccessfully on several occasions to obtain authority for industrial water marketing of main stem reservoir water—the same authority asserted as the basis for the ETSI contract almost forty years later.

B. The Temporary Effort By Army And Interior During The 1970's To Engage In Industrial Water Marketing From Main Stem Missouri River Reservoirs

Armed with an internal memorandum of its Solicitor which ignored Sections 6 and 8 of the Act and suggested that it could engage in industrial water marketing unilaterally, (J.A. 120), Interior pressed Army in 1974 to enter into a Memorandum of Understanding ("MOU") as part of a plan to divert main stem Missouri water for energy use. The Army expressed reservations concerning Interior's claim of unilateral authority to engage in such marketing. For example, the Acting General Counsel of the Army disputed the Interior Solicitor's conclusion, advising the Army's Chief of Civil Functions that although there was "arguable authority" for Army and Interior, "acting jointly," to market main stem water for industrial use, "the Secretary of the Interior may not market the water from these reservoirs independently." (J.A. 129, 135 n.*.) (Pet. App. 10a-11a.)

After further negotiations between the two agencies, the MOU was signed in 1975 as a temporary measure to satisfy perceived energy needs. The MOU provided that Interior would act on its own behalf and as agent for the Army and assume authority to market water for energy use from main stem reservoirs so long as each contract had prior Army approval. (J.A. 136.) (¶¶ 1, 2, 3, 3c.) (*see* ETSI Br. App. 113a). Shortly after signing the MOU, the Army Secretary wrote the Interior Secretary urging that they both seek clarification from the Congress concerning the authority question. (J.A. 142.)

The MOU lapsed in 1978, with Army continuing to express reservations about Interior's assertion of authority. (J.A. 143-144.) It has not been renewed. The In-

terior Department executed two water service contracts under the MOU procedures. Signed in 1982, the ETSI contract was the only water service contract that was both negotiated and executed by the Interior without reliance upon the MOU. It was Interior's only independent unilateral effort to contract for main stem Missouri River water for industrial purposes. (Pet. App. 11a.)

C. The Decisions Below That Enjoin The ETSI Contract

Interior invoked Section 9(c) of the 1944 Act to execute a water service contract with ETSI in July 1982 as part of a "program" of furthering Missouri River water withdrawals for energy use. The contract was not approved by Army. (Pet. App. 15a-16a.) It would have allowed the transfer of 20,000 acre feet of water annually from the Oahe Reservoir on the main stem of the Missouri River in North and South Dakota to the Powder River Basin in Wyoming, where it would have been mixed with crushed coal and then used to transport that coal in the form of a slurry out of the Missouri River Basin to unspecified power plants in Oklahoma, Arkansas and Louisiana.[10] There the water would have been discharged; none of it would have been returned to the Basin.

Concerned that the ETSI project was harmful and unnecessary, and that it would set the precedent for additional industrial water withdrawals from the Missouri, the private respondents (the Kansas City Southern Railway Company, the Sierra Club and three chapters of the National Farmers Union) challenged the Interior Secretary's authority to enter into the ETSI contract on sev-

---

[10] Twenty-thousand acre feet of water equals approximately 6.5 billion gallons. Based on standard estimates of average daily personal water needs, *see* A. S. Goodman, *Principles of Water Resources Planning* 87 (1984), this would constitute enough water to provide the annual municipal supply of a town of 133,000 inhabitants. ETSI had also agreed to permit certain towns in western South Dakota to use its pipeline to transport water. See ETSI Br. at 4. However, those towns would have executed contracts for that municipal use with Army, not Interior. *See* App. 19a.

eral grounds.[11] On May 3, 1984, the district court concluded that the Interior Secretary was not authorized to execute the ETSI contract, and granted private respondents' motion for summary judgment as to Count III of their complaint, permanently enjoining contract performance.[12]

The district court entered the following findings that were confirmed by the court of appeals and that remain central to this case: (1) Oahe Reservoir was undertaken by the Corps under Section 9(b) of the 1944 Act, and was not undertaken by the Bureau under Section 9(c) (Pet. App. 54a); (2) there is no separate storage space designated for irrigation at Oahe (*id.* at 63a-64a); (3) the dominant purpose of Oahe is flood control, not reclamation (*id.* at 56a); and (4) Interior has never promulgated regulations governing irrigation storage at Oahe, nor has it taken any reclamation actions with respect to Oahe (*id.* at 61a, 64a-65a). The court concluded both

---

[11] The States of Missouri, Iowa and Nebraska also challenged the ETSI contract. In addition to asserting that the Interior Secretary had acted in contravention of Section 6 of the Act, respondents challenged execution of the ETSI contract on other grounds, including that the diversion of water proposed by ETSI would constitute an unprecedented interstate transfer of water out of the Missouri River Basin states, that ETSI's use was not an authorized use, and that Interior had not adequately assessed the environmental impacts of the ETSI project. These other challenges presented in the private respondents' complaint, including the other authority issues, remain pending in the district court and are not present here.

[12] After initially dismissing the Kansas City Southern Railway Company along with the Rocky Mountain Chapter of the National Farmers Union for lack of standing to challenge the Interior Secretary's authority, the district court vacated that decision as to the Company upon reviewing additional evidence showing that the Company relied upon specific quantities of Missouri River water at its Kansas City corporate headquarters, reserved a decision on the Company's standing, and allowed it to participate in the appeals. (Filings 294, 366 and 386 at J.A. 68, 75, 77.) The Eighth Circuit did not reach the issue of standing with respect to the private respondents in its opinion below (Pet. App. 7a, 11a-15a), and that issue is not raised in the petitioners' briefs. *Cf.* Fed. Br. at 20.

that Congress granted control over the storage space in flood control projects such as Oahe to the Corps, not to the Bureau (*id.* at 59a-63a), and that Oahe Reservoir is not a reclamation development (*id.* at 64a-65a).

In addition, the district court noted that the congressional debate over the 1944 Act was comprehensive, and concluded that Congress left no issue as to the division of authority between Army and Interior for implication. (*Id.* at 68a.) In that spirit, the court ruled that the express grant of industrial water marketing authority to the Army in Section 6 is exclusive, and that a similar grant of authority to Interior cannot properly be implied from Section 9. (*Id.* at 67a.)

In the wake of the district court decision, ETSI and South Dakota briefly pursued an application to the Army for Oahe water under the Water Supply Act of 1958, 43 U.S.C. 390b. However, in July 1984 ETSI terminated its agreement with the South Dakota Conservancy District for assignment of a water right from Oahe (J.A. 257), and announced that it had also terminated its project. The respondents then suggested that the appeals should be dismissed as moot or unripe. Following remand to the district court for an initial mootness determination, a split panel of the Eighth Circuit ruled that the case was not moot.[13] On the merits, the court of appeals affirmed the district court.

---

[13] The district court's determination that this case was not moot erroneously assumed that live issues remained outstanding between the petitioners and the respondents even after ETSI had cancelled its South Dakota water permit and terminated its project. It gave no weight to the critical fact that the water permit was an express precondition to the validity of the contract. (J.A. 227.) It also concluded that Interior's "program" of water withdrawals remained ripe for consideration, even though the ETSI contract constituted the only unilateral effort by Interior to implement that program. In addition, it invoked the wrong legal standard, ignoring *Powell v. McCormack*, 395 U.S. 486, 496 (1969) and *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-396 (1980), which hold that a case is moot where the issues presented are no longer "live" as between the adverse parties, and relying instead on the inap-

The court of appeals concluded as a threshold matter that the plain language of Section 9 "does not attempt to delegate authority on the basis of storage for a particular use within a given development." (Pet. App. 19a.) Instead, said the court, Section 9 "envisions that each department will develop the projects which it undertakes in accordance with the applicable law, and specifically, that the reclamation laws will govern projects undertaken by the Secretary of the Interior." *Id.* Thus, in the court's view, "the inquiry in this case then is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to Section 9(c) of the Act." *Id.* The court of appeals concluded that it was not.[14]

The court of appeals refused to accept the petitioners' argument that the Interior Secretary enjoys industrial water marketing authority so long as there is "irrigation storage" available at Oahe. (*Id.* at 22a-24a and nn. 15 and 16.) The court explained that while the Congress may have granted Interior authority to engage in irrigation at Oahe, that authority did not extend "to use of irrigation *storage* for industrial purposes." (*Id.* at 24a n.16) (emphasis in original). The court also emphasized the

---

posite reasoning of *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). (Fed. Pet. Reply at 3a-6a.) After reviewing briefs from all parties (see J.A. at 86), two members of the Eighth Circuit panel concluded that the district court's "factual" findings were not clearly erroneous. (Fed. Pet. Reply at 2a.) Nonetheless, the record developed before the courts below strongly suggests that the issue before the Court is not live as to ETSI, and at best unripe as to Interior. (*See* Filings 442 and 443 at J.A. 41.)

[14] In so doing, the court of appeals expressly adopted the factual findings of the district court (Pet. App. 19a), and affirmed each of the district court's conclusions, agreeing: (1) that the mere existence of irrigation capacity at Oahe is not sufficient to render it a reclamation development undertaken by Interior; (2) that there has been no significant reclamation development at Oahe and there is no separate storage space allocated for irrigation there; and (3) that the Congress had determined each dam would be undertaken and controlled by the agency with the dominant interest in the purpose for which the dam was constructed. (*Id.* at 20a-21a.)

clear grant of authority in Section 6 to the Secretary of the Army to contract for industrial use of water stored at main stem reservoirs, and concluded that it would be incongruous to assume that a Congress intent on demarcating jurisdiction between two agencies would authorize those very agencies to contract for the same use from the same reservoirs. (*Id.* at 31a and n.23.) One member of the panel dissented, and an evenly divided court of appeals denied rehearing. The petitions for writ of certiorari were granted on March 2, 1987.

D. The Practical Implications Of This Case For Existing Users Of Missouri River Water

The private respondents, who represent farm, conservation and commercial interests located in the Missouri River Basin,[15] believe that the rulings below are important because they ensure the maximum flexible multipurpose development of the River's resources in a fashion that recognizes the intention of Congress to protect the interests of existing users of Missouri River water. First, Section 6 of the 1944 Flood Control Act explicitly requires the Army Secretary to take into account the effects of water depletions for industrial use from Army reservoirs upon existing users, thereby ensuring that dependable flows of the Missouri are maintained downstream of the main stem dams. The reclamation laws triggered by Section 9(c) of that Act do not require any such finding by the Interior Secretary. To the contrary, Interior need only satisfy itself that miscellaneous use of water from a

---

[15] The Kansas City Southern Railway Company is headquartered in Kansas City, Missouri and relies on the Missouri River for its water supply there. In addition, it hauls coal and agricultural commodities in portions of the Basin. The Sierra Club has members throughout the Missouri Basin whose use and enjoyment of natural resources would be affected by the government program of industrial diversions of water from the River embodied in the ETSI project. Members of the Iowa and Nebraska Farmers Union Chapters reside alongside the Missouri and use its waters for crop and livestock purposes.

dam will not impair the "irrigation efficiency" of the reservoir itself.[16]

At the same time, the rulings below and the interests of the private respondents in protecting adequate Missouri River flows pursuant to Section 6 also further the interests of others in the Basin, and support the national interest, in certain important respects. The Army's existing regulations under Section 6, as well as recently-prepared policy guidance, demonstrate that agency's concern for protecting a broad range of water users.[17] Furthermore, monies collected by the Army under Section 6 from industrial water users are deposited into the general fund of the United States treasury, thereby helping, in some measure, to repay the nation for its significant investment in the main stem dams of the Missouri Basin.

In addition, our reading of the Act, and the rulings of both courts below, comport fully with the national reach of the Corps' jurisdiction (as opposed to the purely western jurisdiction of the Bureau) and with the day-to-

---

[16] Events in this case are instructive in this regard. Respondents expressed concern below that the ETSI project and the program of which it was a part would exacerbate water supply problems duing low-flow periods on the Missouri, and would create other significant adverse impacts. (*See* Filing 1 [Complaint] J.A. 42 at ¶¶ 23-33.) But Interior failed to analyze the downstream impacts of the ETSI diversion, wrongly claiming that it had already done so in a generic impact statement prepared in 1977. (*See* Filing 1, J.A. 42 at ¶¶ 39-46.) Similarly, Interior emphasized that it would not engage in any further analysis of downstream impacts occasioned by the additional water withdrawals it contemplated under its "program." On the other hand, one of the Army's first actions when presented with the 1984 application for Oahe water on ETSI's behalf was to give notice that, "[a]s the Federal agency responsible for marketing storage for the industrial water," it intended to prepare a supplemental environmental impact statement that would have assessed "Missouri River depletion impacts." 49 Fed. Reg. 30223-24 (July 27, 1984). Army halted that effort when ETSI cancelled its project.

[17] *See* J.A. 207; *see also* March 13, 1986 Opinion of Army General Counsel (App. 16a); March 24, 1987 Memorandum for the Director of Civil Works (App. 19a).

day operation of the projects along the main stem of the Missouri River—an operation that is controlled by the Army from its Reservoir Control Center in Omaha, Nebraska. The Army publishes and implements both the "Master Manual" and the "Annual Operating Plan" for main stem reservoir operations.[18] *See* Fed. Br. at 41 n. 61. Because the Army, and not Interior, oversees the day-to-day orchestration of the interrelated operations of each of the main stem dams for the benefit of the entire Missouri Basin, Army is uniquely situated to assess the merits of any application for industrial water use from a dam on the main stem such as Oahe.

SUMMARY OF THE ARGUMENT

Congress enacted the Flood Control Act of 1944 in a careful effort to provide for wise conservation and development of the water resources of the Missouri River Basin. In several key provisions, the Act directs protection for existing uses of those resources, and provides for the construction and operation of dam and reservoir projects to ensure that flood control and navigation will be paramount on the main stem of the Missouri, while irrigation will be preeminent on the River's tributaries. In addition, the Act specifically provides that waters deemed surplus to the functions for which the main stem dams are designed can be made available for industrial use by the Secretary of the Army, so long as such water marketing does not adversely affect existing water uses. The question here is whether the Interior Secretary, who is not bound to protect existing water uses other than for irrigation, properly interpreted the Act by asserting author-

---

[18] The Corps' *1981-1982 Missouri River Main Stem Reservoirs Annual Operating Plan* ("AOP") is a detailed 85-page document that analyzes prior experience with the operation of the reservoirs and sets out plans for manipulation of those reservoirs in the coming year to satisfy requirements both upstream and downstream. The AOP specifically provides for the maintenance of water supply for upstream irrigation, as well as the release of flows for downstream municipal water supply and water quality control. *Id.* at 4-5, 8-10.

ity to market water for industrial use from Oahe Reservoir, a main stem project constructed and operated by the Army.

The plain language of the Act does not provide Interior the authority it seeks. In Section 6, the Act expressly provides Army the authority to market for industrial use water deemed surplus at Army-controlled dams. In that same section, the Act directs that in marketing that water, Army protect existing users of the Missouri River from excessive depletions.

By contrast to Section 6, the Act is silent on its face as to the existence in Interior of unilateral industrial water marketing authority at Army dams. Indeed, in Section 8, the Act requires Interior to gain prior approval by Army, as well as specific congressional authorization, before constructing irrigation works at Army reservoirs and applying reclamation law to waters used for that irrigation.

Faced with statutory language that does not in plain terms grant authority to Interior, the petitioners abandon the Act and embark upon a lengthy and complicated exegesis that elevates non-statutory agency comments to the level of enacted law, ignores congressional rejections of attempts to secure the authority in question, garbles the common usage and contemporaneous understanding of selected terms found in the Act, and finally produces a result that directly conflicts with the central intentions of Congress. At bottom, petitioners ignore the fact that any authority Interior might enjoy under the reclamation laws at Oahe would derive from construction of approved irrigation works there. No such works have been built.

Petitioners' argument relies heavily upon agency-authored comments from the Pick and Sloan Plans—two Missouri River Basin development documents that were submitted to the Congress and "approved" in Section 9(a) of the 1944 Act. Improperly elevating these agency comments to the level of enacted law, and injecting them with an expansive reading not supported by the actual words used, the petitioners argue that Section 9 author-

ized the Interior Secretary to enter into the industrial water contract in issue here.

The fatal flaw in petitioners' reliance upon these snippets from the Pick and Sloan documents is that the Congress itself unequivocally rejected the concept of Interior control over water stored at Army dams during deliberations over the 1944 Act. Specifically, Congress rejected several amendments to Section 6 proposed by the Interior Secretary and his allies that would have granted him such control. Moreover, elsewhere (in Section 8), Congress significantly altered a suggestion of the Interior Secretary that would have granted him authority over water stored at Army dams, by carefully limiting his authority at such dams to the distribution of water for irrigation following Army approval and specific congressional authorization of irrigation works.

Additionally, in Section 9(c) of the Act, the Congress made clear that the Interior Secretary could exercise his powers under the reclamation laws only in connection with reclamation developments to be undertaken by him. The government contends that the ETSI contract itself can be deemed an Interior "reclamation development," while ETSI contends that water "stored for irrigation at Oahe" is such a development. But these contentions ignore the contemporaneous understanding of the Interior Secretary, his Reclamation Commissioner, and the Congress, as well as a host of other legislative definitions and understandings.

Finally, the interpretation for which the petitioners strive would ignore the plain intention of the Congress in the Flood Control Act of 1944: to divide jurisdiction between Army and Interior over the use of Missouri River water resources in a fashion that avoided duplication of effort and furthered efficient development of those resources while protecting lawful uses of the River. As written, Sections 6, 8 and 9 of the Act fit together neatly, making flood control, navigation, irrigation and industrial uses available, and protecting existing uses, without producing any conflict between Army and Interior. Petitioners' concept would ignore this carefully-

crafted statutory plan. It would not promote wise use and conservation of those resources; instead, it would avoid the protections built into the Act.

This case presents a pure issue of statutory interpretation that is governed by the plain language of the 1944 Act. In developing the Act itself, and in 1982, the Congress rejected the theory under which Interior seeks authority here. Moreover, both Interior and Army have since 1944 taken positions contrary to the one here presented. Thus, deference to the petitioners' construction of the Act is inappropriate. The rulings below carefully follow the language and legislative history of the Flood Control Act of 1944, and they should be affirmed.

ARGUMENT

I. The Plain Language Of The Flood Control Act Of 1944 Exclusively Empowers The Secretary Of The Army To Control The Marketing Of Water From Main Stem Missouri River Reservoirs For Industrial Use

Any endeavor at statutory interpretation naturally begins with the words of the statute. *Park 'N Fly v. Dollar Park and Fly*, 105 S.Ct. 658, 662 (1985). "If the statutory language is clear, it is ordinarily conclusive." *United States v. Clark*, 454 U.S. 555, 560 (1982). In this part of the brief, respondents show that the language of the Flood Control Act of 1944 is clear, and that it denies Interior authority to execute the ETSI contract. Respondents address petitioners' interpretation of the Act in Part II.

A. Section 6 Of The Flood Control Act Authorizes Only The Army To Contract For Industrial Use Of Water At Main Stem Reservoirs

The two lower court decisions properly recognized that the Congress clearly addressed the issue presented in this case. In 1944, Congress expressly considered and decided which agency should market water for industrial purposes from main stem Missouri River dams operated by the Army. And in Section 6 of the Flood Control Act, Congress gave its unambiguous answer:

> Sec. 6. *The Secretary of the Army is authorized to make contracts* with States, municipalities, private concerns, or individuals, *at such prices and on such terms as he may deem reasonable, for* domestic and *industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army. Provided, that no contracts for such water shall adversely affect then existing lawful uses of such water.* All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

33 U.S.C. § 708 (emphasis added). There is no dispute that the Oahe reservoir is "under the control of the Department of the Army." Thus, the courts below concluded (Pet. App. 31a and n. 23), and the government does not dispute, Fed. Br. at 38-39 and n.58, that under this provision the Army is authorized to contract for the same water for the same purpose as that envisioned in the ETSI contract.

Because Congress used such express language, it is inappropriate to fabricate a concurrent authority in a second agency through an extended analysis of legislative materials and other provisions both within and without the Flood Control Act. This is particularly true given the fundamental Congressional intent to delineate clearly the respective powers of Interior and Army in order to avoid overlap and duplication between the two agencies. (See pp. 2-4, *supra.*) In short, having expressly declared one agency's authority in one section of the Act, it is not credible to assert that the Congress would then shroud another agency's identical authority in a maze of statutory subtleties. *See Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

For Army-operated dams, Section 6 expressly grants industrial water contracting authority to the Secretary of the Army alone. Army's control over such activity is in turn reinforced by the language of Section 8 of the Flood Control Act. Section 8 demonstrates that Interior lacks *any* defined authority at dams like Oahe, where it

has never built the additional works necessary for irrigation.

B. Under Section 8 Of The Flood Control Act, The Reclamation Laws Do Not Apply To Army-Controlled Reservoirs Unless And Until Interior Completes Additional Works For Irrigation Purposes After Army Approval

Section 8 of the Flood Control Act precisely defines the limited authority of the Interior Secretary at dams operated by the Army. (App 2a-3a.) (Pet. App. 27a.)

Section 8 defines the relative power of Army and Interior by establishing the procedure Interior must use to acquire reclamation authority at Army-controlled dams. At "any dam and reservoir project operated under the direction of the Secretary of the Army," the Interior Secretary is, under certain conditions, authorized to build and operate "such additional works . . . as he may deem necessary for irrigation purposes." Where additional works are built, Section 8 authorizes the Interior Secretary to proceed "under the provisions of" the Reclamation Act of 1902, and thus incorporates those provisions to govern the "additional works."

Section 8 thus authorizes the Interior Secretary to carry out irrigation through irrigation works at Army-controlled dams if and only if three conditions are met: (1) "the Secretary of the Army determines . . . that [the] dam and reservoir project . . . may be utilized for irrigation purposes," (2) the Interior Secretary makes "a report and findings [on the proposed irrigation works] . . . as provided in said Federal reclamation law," and (3) Congress grants a "subsequent specific authorization . . . by an authorization Act." [19]

Thus, Section 8 establishes a limited sphere of authority for Interior at Army-controlled reservoirs to construct, operate and maintain irrigation works following

---

[19] In 1986, the Congress amended Section 8 to authorize Army to allocate for irrigation use water that otherwise would be available for municipal and industrial purposes. Pub. L. No. 99-662, Section 931, 100 Stat. 4196; 43 U.S.C.A. 390 (1987 Supp.).

approval by both Army and the Congress. Where the Interior Secretary builds and operates those works necessary for irrigation, the reclamation laws are incorporated to govern such action. Conversely, where the Interior Secretary has not obtained Army and congressional approval and has not built the necessary works—where the irrigation function remains only a potential, not a reality—Interior simply cannot rely upon reclamation law to support industrial water marketing authority. By designing Section 8 in this fashion, Congress emphasized that Interior's authority at Army dams was limited, and ensured that the protections for existing users contained in Section 6 would not be eroded.

There is no dispute that the Interior Secretary never constructed at Oahe, and does not operate or maintain, "additional works . . . necessary for irrigation purposes."[20] Thus, as Congress confirmed in 1982 (see pp. 41-42, *infra*) absent the construction and operation by Interior of irrigation works at Oahe, the reclamation laws do not apply there. Interior is therefore without authority to market Oahe water under the reclamation laws.

C. Section 9 Of The Flood Control Act Incorporates The Reclamation Laws Only For Reclamation Developments To Be Undertaken By The Secretary Of The Interior

Sections 6 and 8 speak directly to the issue presented in this case, and plainly provide that at Army-operated dams like Oahe, the Army is empowered to control the marketing of water for industrial uses. The two sections fit together to provide for efficient water development

---

[20] Congress gave specific authorization for such construction in 1968. Act of August 3, 1968, Pub. L. No. 90-453, 82 Stat. 624, 625. However, the work had "barely started" by mid-1975 (ETSI Br. App. at 123a), and in 1978 the South Dakota legislature enacted a construction moratorium. 1978 S.D. Session Laws Ch. 333, codified at S.D.C.L. § 46A-1-78. In 1982, the Congress enacted legislation authorizing Interior to cancel the master contract for the initial stages of the Oahe irrigation unit. Act of September 30, 1982, Pub. L. No. 97-273, 96 Stat. 1181.

while ensuring that water users of the River are protected by Army. Section 9, the provision of the Flood Control Act that authorized the Missouri River Basin projects, furthers this statutory plan. (App. 3a-4a). Section 9 divides the Missouri River projects into two groups, those "to be undertaken by the War Department [Army]," and those "to be undertaken by the Secretary of the Interior," and applies the reclamation laws *only* to the latter.

Section 9(a) "approves" the Pick-Sloan plan and "authorizes" its initial stages. Sections 9(b) and 9(c) establish what federal law shall govern which projects; they also provide that works to be undertaken by Army shall be prosecuted under its direction. Where Section 9(c) applies the reclamation laws to govern the "reclamation and power developments to be undertaken by the Secretary of the Interior," Section 9(b) places the flood control projects "under the direction of the Secretary of the Army and supervision of the Chief of Engineers."

Thus, Sections 9(b) and 9(c) provide that the law that governs a work or development depends on which agency is to undertake that work or development under the approved plan. The reclamation laws apply only to those developments to be undertaken by Interior. It is abundantly clear, however, that Interior did not "undertake" the Oahe project, either in whole or in part. Nor has Interior "undertaken" any reclamation or power development of Oahe after it was built. Under both the Pick plan and the Sloan plan, Oahe dam and reservoir were to be undertaken by the Corps because its predominant purpose was flood control and navigation. H.R. Doc. No. 475 at 7; S. Doc. No. 191 at 4, 7. In fact, there is no dispute that Oahe was constructed entirely by the Corps and no part of it was undertaken by Interior. ETSI Br. at 5; (Pet. App. 10a). Without question, therefore, Section 9(c) cannot apply the reclamation laws to the Oahe project, but those provisions governing dams "under the control" or "under the direction" of the Army, such as Sections 6 and 8, do control the use of water at Oahe.

II. The Flood Control Act Of 1944 Does Not Authorize The Secretary Of The Interior To Execute The ETSI Industrial Water Service Contract

Part I of this brief explains the relevant sections of the Flood Control Act of 1944 by relying on the plain language in each section. Petitioners' method of interpretation is quite different: they begin with legislative materials and work backwards, seeking to explain away troublesome statutory language with ostensibly helpful legislative history. In making the statutory terms secondary to other sources of interpretation, the government and ETSI distort the meaning of the Act.

Moreover, petitioners' analysis is fundamentally flawed. It rests entirely on the incorrect assumption that in 1944 Congress divided the powers of Army and Interior by assigning to each some quantity of water storage that each agency would regulate and control. But the Flood Control Act divided *authority*, not water. With respect to each dam in the Missouri River Basin, Congress divided the agencies' authority according to purpose and control. The question of which agency is authorized to market water from a Missouri River Basin dam thus depends not on how the agency asserting authority characterizes the block of reservoir water it seeks to manage, but on which agency controls the dam and for what purpose the water is used. Though Congress reserved the function of reclamation and miscellaneous water uses in Interior at dams Interior controls, it also empowered the Army to manage industrial uses of water at dams under Army control.

To justify their view, ETSI and the government seriously misconstrue the three pertinent sections of the Flood Control Act, giving at best selective attention to the actual terms of those provisions. None of their contentions withstands scrutiny.

A. Section 9 Does Not Authorize The Interior Secretary To Market Water For Industrial Use At Oahe Reservoir

A central thesis of petitioners' argument is that by enacting Section 9 Congress allocated to Interior some

quantity of water at Oahe and other Army-controlled projects that would remain subject to the control of Interior regardless of actual use. Only by viewing the Act in this manner could they frame the question presented as whether the Interior Secretary is authorized to supply "unutilized" or "excess" "*irrigation water*" from main stem dams for industrial use. Their argument then focuses on Interior's reclamation authority at projects under its control, and contends that this authority must extend to "irrigation water" at Oahe. But under a correct reading of the Act, at present there is no reserved block of "irrigation water" at Oahe. Under Section 8, Interior may engage in irrigation functions at Oahe, if it first obtains Army and congressional approval. But there is no existing block of "irrigation water" at Oahe, because Interior has not built the additional works necessary for irrigation, and because no water has ever been drafted into those works to serve an irrigation function.

The government attempts to resolve this problem by contending that the ETSI contract itself constitutes an Interior "reclamation development." This contention, too, is plainly wrong.

1. *Section 9(a) Does Not, By Approving The Pick-Sloan Plan, Reserve Any Block of Water For Interior Control*

Congress stated in Section 9(a) that it approved the "general comprehensive plans set forth" in the three Pick-Sloan documents. The government and ETSI suggest that this provision incorporates in full all the language of those documents and then embark on a review of those documents and various references in the legislative record of the Act. Fed. Br. 2, 21, 24-29; ETSI Br. 11-16. From this review they wrongly conclude that Interior is authorized to 'administer the reclamation aspects" of Missouri Basin development. They then seek to defend that conclusion despite the plain language of Sections 6 and 8. This analysis is seriously deficient in two respects.

First, this argument wrongly accords the statements in the Pick-Sloan plan the same dignity as the statutory

language of the Act itself. Congress vigorously debated and amended the bill that became the Flood Control Act of 1944. Congress would not labor over an express statutory provision if it meant for the issue to be controlled merely by reference to legislative documents. (Pet. App. 31a and n.23; 68a.) The proper analysis thus begins with the language of those provisions, and only then considers the Pick-Sloan documents. *See Kosak v. United States*, 465 U.S. 848, 853 (1984); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798 (1984). Indeed, because the Act's language has primacy over referenced material, the proper analysis seeks to reconcile the Pick-Sloan documents with the statutory provisions, not vice versa. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96, *reh'g denied*, 341 U.S. 956 (1951) (Jackson and Minton, JJ., concurring).

The supremacy of statutory language over the language of a referenced legislative "plan" is demonstrated by *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153 (1953). *Chapman* teaches that even where the statute is *silent* as to an issue, the language of an "approved" plan does not control unless it is "clearly an integral part of the plan."[21] *A fortiori*, where the statutory language *does* address an issue, the language of the report cannot rule. Since Sections 6 and 8 plainly provide that the Army is authorized to control the marketing of water for industrial uses from Army dams, any contrary implication from the reports cannot govern. Especially because the division of federal authority for the entire Missouri River Basin is a significant controversy, it cannot be assumed that Congress would decide the issue with vague declarations in a referenced report.

---

[21] In *Chapman* this Court emphasized that language in transmittal letters appearing in a Corps report "approved" by the Congress in the 1944 Act was not sufficiently plain, nor sufficiently made "an integral part of the plan," to assist in resolving the issue presented. *Id.* at 160. *Chapman* applies with even greater force here, where the actual language of the reports is silent on industrial use by Interior and in fact states that Army will control the main stem reservoirs.

Indeed, a search for *any* clear and unambiguous statements in the Pick and Sloan plans supporting the petitioners' analysis reveals a second major flaw: the language of the Pick-Sloan plan nowhere expressly grants Interior the authority to market water from main stem dams for industrial purposes. Not only is there no clearly manifested intent to grant Interior such authority, there are no statements that even imply such a conclusion.[22]

ETSI quotes language which states that Interior shall control the irrigation "features" of a project, and apparently reasons that Oahe's irrigation potential is a "feature" of that project subject to Interior control. ETSI Br. at 13. But the very language ETSI quotes belies this interpretation. The Sloan Plan states at page 11 that "[t]he agency with primary interest in the dominant function of any feature proposed in the plan should *construct and operate that feature.*" (emphasis added). Clearly, it was understood that features are particular, concrete works.[23] So when the Sloan Plan states on the same page that "[a]ll irrigation features should be operated by the Bureau of Reclamation," it simply means that the Bureau is responsible for operating irrigation works, even at Army-controlled dams. This language is perfectly consistent with the plain meaning of Section 8.

Similarly, petitioners quote language stating that Interior should regulate "utilization of storage *reserved for irrigation* in all multi-purpose reservoirs." Fed. Br. at 25;

---

[22] The congressional debate mirrored this fact. The district court noted that "[a]lthough many people discussed the division of control over the main stem reservoirs, nobody said that the Bureau's level of control over certain water stored for irrigation in Corps-built dams was so complete that the Bureau could furnish that irrigation water for non-irrigation purposes, *i.e.*, industrial or miscellaneous uses." (Pet. App. 58a-59a.)

[23] As Senator Overton emphasized, at Army dams "*the irrigation features of it, that is, all irrigation works* necessary to utilize the surplus water in the dam shall be turned over to and administered by the Interior Department. . . ." *Senate Hearings* at 222 (emphasis added). Similarly, Reclamation Commissioner Bashore testified to the House concerning *construction* of irrigation *features*. *House Hearings* at 912-13.

ETSI Br. at 12 (quoting Pick Plan at 3-4). Petitioners merely assume that water has been "reserved for irrigation" because Congress contemplated that Oahe would serve an irrigation function. But the fact that Congress authorized a dam with irrigation potential, and contemplated that irrigation might eventually occur, does not mean that Congress reserved any block of water as "irrigation water," or granted Interior any control over some portion of Oahe reservoir, even in advance of any reclamation project.

Indeed, Congress specifically established a procedure in Section 8 whereby water could be reserved for irrigation, a procedure never completed at Oahe. Before the necessary irrigation works are constructed, water is drawn into the distribution system, and Interior contracts with an irrigation for water, water is in no sense *reserved* for irrigation.[24] Moreover, Congress' failure to specify any quantity of water "reserved" for irrigation counsels against inferring that it reserved any water for that purpose. As the district court stated: "[O]ne wonders how the Interior Department is to control what cannot be identified." (Pet. App. 64a).[25]

---

[24] The legislative history demonstrates that Bureau jurisdiction was limited to control of water in the distribution systems, "after it is released" from the reservoir. *See House Hearings* at 646. Thus the district court observed that "the Bureau's interest in the irrigation aspects of a flood control dam would be accommodated by letting the Bureau control the irrigation distribution system, not the water or storage space in the reservoir." (Pet. App. 58a.)

[25] Before the district court, the federal government and ETSI pointed to "different blocks of water" over which Interior allegedly exercised control. (Pet. App. 64a.) Here, ETSI ignores the issue, while the government attempts to dismiss it as "formalistic." Fed. Br. at 41-42 n.62. Thus, they never expressly state *how much* water is supposedly "irrigation water." Amici admit that "[i]t is *not possible* from reading Section 9(a) or the Pick-Sloan Plan . . . to quantify precisely the volumes of water under the control of each Secretary," but agree with the government that such inquiry is unnecessary. Amici Br. at 17. To the contrary, the inquiry is critical to establishing an outer limit on the amount of water Interior would divert from main stem dams under its industrial

2. *The ETSI Contract Is Not A Reclamation Development Undertaken Under The Pick-Sloan Plan Pursuant To Section 9(c)*

Section 9(c) states that "the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws." The two courts below appropriately read this provision to apply federal reclamation law to those projects assigned to Interior by the Pick-Sloan plans, and concluded that Oahe was not such a project. (Pet. App. 19a, 54a). However, relying on a dictionary definition of "development" that encompasses the act of "making usable or available," the government contends that "reclamation . . . developments" are not merely physical projects, but include industrial use contracts like the one Interior entered with ETSI. The government then invokes Section 9(c) of the Reclamation Projects Act of 1939 to demonstrate that industrial contracting is a "recognized reclamation use." Fed. Br. at 33.

This argument is plainly wrong. It is circular. Petitioners would have the ETSI contract justify itself. Thus, under their argument, the ETSI contract is said to be a "reclamation development" under Section 9(c); under Section 9(c), reclamation developments undertaken by Interior are governed by reclamation laws; and the reclamation laws authorize Interior, once it has undertaken a reclamation development, to market water from

---

water marketing program. Petitioners' inability to set such a limit graphically illustrates the grave danger created by their theory: since they cannot define the block of water they wish to control, they cannot ensure existing users that there would be any reasonable limit placed on amounts diverted or on harm occasioned thereby. In this vein, it is instructive that when Reclamation Commissioner Broadbent recommended to the Interior Secretary that the ETSI contract be approved, he observed only that "the Bureau's water marketing program is *currently limited* to 1 million acre-feet." (J.A. 219.) (emphasis added.) Respondents' water experts testified in the proceedings below that withdrawals of the magnitude contemplated by the Interior program would occasion significant harm downstream. *See, e.g.*, Filing 315, J.A. 70 (affidavit of Thomas P. Ballestero at ¶ 17.)

that development for industrial uses. In short, petitioners would have the contract itself be the predicate for Interior's authority to enter into the contract. This is a logical fallacy.

Moreover, this entire argument depends upon an alleged difference in meaning between "developments" and "works." As is the case with the specious distinction between irrigation "features" and irrigation "works," the actual use of the terms demonstrates that they are synonymous.[26] The term "development" is simply preferred when speaking of hydroelectric power, and Section 9(c) concerns "reclamation and power developments."[27] In any event, Congress does not authorize or appropriate money for reclamation "developments"; such provisions refer instead to "works."[28]

---

[26] The Interior spokesman who testified on the Flood Control Act clearly understood that the term "development" meant a physical work. *See House Hearings* (comments of Commissioner Bashore) at 289 ("[a]ll of our *construction* at the present time, with the exception of power projects and a few irrigation *developments*, is under stop-work orders . . . [W]e are preparing to resume *construction* on these irrigation *developments*.") (emphasis added). Moreover, the reclamation laws incorporated by Section 9(c) plainly apply to construction of projects. The 1902 Reclamation Act itself was meant to authorize the Interior Secretary to commence the *construction* of projects. *House Hearings* at 627. Similarly, the 1939 Reclamation Project Act was intended to provide a plan of payment of *construction* charges for reclamation projects. H. Rep. 995, 76th Cong., 1st Sess. 1 (1939). In fact, the Acting Interior Secretary wrote that Section 9(c) of the 1939 Act "relates to the *construction* of new projects, new subparts of projects and new supplemental works of projects." *Id.* at 5 (emphasis added).

[27] For example the Sloan Plan refers to power generated at hydroelectric "developments", obviously referring to particular projects or works. *See id.* at pages 16, 124, 136. Notably, the Federal Power Act, passed in 1920, defines "project" as a "complete unit of improvement or *development*, consisting of a power house" and various other structures. 16 U.S.C. § 796(11). (emphasis added).

[28] Section 9(a) only authorized the "initial stages," clearly referring to construction of works, and Section 9(e) consequently only appropriates money for "the partial accomplishment of the *works*

In addition, the federal reclamation laws only authorize Interior to supply water for non-irrigation uses from projects it has constructed.[29] Thus, the provisions of those laws authorizing Interior to contract for industrial purposes apply only to projects Interior otherwise controls, i.e., reclamation projects. Merely incorporating these provisions under the Flood Control Act does not grant Interior authority to control industrial uses at projects it did not construct, and does not operate.

B. Section 8 Applies Directly To The Missouri River Basin Projects Authorized In Section 9 And Limits Interior Authority At Those Projects Controlled By The Army Such As Oahe Reservoir

Neither ETSI, the government, nor the *amici* make any attempt to explain how their theory can be consistent with the plain terms of Section 8. Instead, they argue that Section 8 simply does not apply to projects authorized in Section 9. Though Section 8 is written to have

---

to be undertaken under said plans by the Secretary of the Interior." Two years later Congress appropriated additional money for continuing those same "works." Act of July 24, 1946, Pub. L. No. 79-526 Section 18, 60 Stat. 653.

[29] Only where Interior has proceeded with irrigation from irrigation works is it provided the ancillary authority under reclamation law to make contracts for "miscellaneous" uses. Thus, Interior Secretary Ickes himself recognized that "industrial" uses are not "reclamation" uses. *Senate Hearings* at 312 (letter from Secretary Ickes to Senator Josiah Bailey) and at 457-458 (testimony of Secretary Ickes). (Pet. App. 59a.) Congress emphasized this fact in debates over the Act of February 25, 1920, 43 U.S.C. § 521 (App. 8a), which authorizes Interior to supply water for "other purposes than irrigation" from "any project irrigation system." ("The reclamation law, strictly speaking, does not allow them to use water for any other than irrigation purposes.") (Remarks of Rep. Taylor explaining the reason for the Act.) 66 Cong. Rec. 2980 (1920). Similarly, the language of Section 9(c) of the 1939 Reclamation Project Act itself speaks of "construction costs," and "operation and maintenance" costs, thus clearly contemplating that Interior build the works from which it supplies water for miscellaneous purposes. These provisions are quite consistent with Section 8 of the Flood Control Act, which limits Interior's authority to works it "construct[s], operate[s] and maintain[s]."

general application, they variously contend that it only applies to projects authorized in Section 10, or to future projects not authorized in the Flood Control Act at all. Fed. Br. at 28-29 n.45; ETSI Br. at 39; Amici Br. at 10 n.6. The infirmity of the government's argument is underscored by the fact that it argued precisely the opposite position below.[30] As for ETSI, it attempts to defend its interpretation, first, by concocting a novel reading of the term "Hereafter" that introduces Section 8, and second, by questioning why Congress would require Interior to obtain subsequent authorization for irrigation works contemplated in the Pick-Sloan plan. Both of these arguments utterly fail to support its reading of Section 8.

The language of Section 8 provides for general application to "*any* dam and reservoir project operated *under the direction of* the Secretary of the Army" (emphasis added). This language precisely tracks the language of Section 9(b), that authorized projects including Oahe to be prosecuted "*under the direction of* the Secretary of the Army." Nonetheless, ETSI contends that the initial term of Section 8, "Hereafter," limits its application to projects authorized under Section 10, or to future projects. ETSI Br. at 39. This reading of "Hereafter" is untenable for several reasons. "Hereafter" commonly means

---

[30] In the court of appeals, the government relied squarely upon Section 8. *See* Fed. Ct. App. Br. at 7, 36-38. Here, however, the government attempts to avoid Section 8 by arguing that Section 9 adopts the Pick-Sloan plan, which in turn purportedly grants to Interior the authority to "administer the reclamation aspects" of Missouri Basin development. Fed. Br. 2, 21, 28-31; *see also* ETSI Br. at 10. It further suggests that Section 9's general "approval" of the Pick-Sloan plan is a "specific" provision which governs over the language of Sections 6 and 8. Fed. Br. at 28-29 n.45. Pages 22-25, *supra*, demonstrate that the government's argument is incorrect. But even if it were closer to the mark, the provisions of the federal reclamation laws show that the argument would not provide the basis for Interior's assertion of authority to execute the ETSI contract in the absence of irrigation works at Oahe. *See* n.29, *supra*.

"after this point in time" and simply denotes that the provision will have only prospective application. *See Black's Law Dictionary* 653, 5th ed. (1979). Thus, the U.S. Code has replaced the term "Hereafter" with the phrase "On and after December 22, 1944," the date of passage of the Flood Control Act. 43 U.S.C. § 390a.

The third sentence in Section 8 emphasizes this common sense reading. In that sentence, which was added to ensure that Section 8 would not affect a dispute at an existing Army reservoir (*See* 90 Cong. Rec. 8552-8553), "Hereafter" is used in contrast to "heretofore": dams and reservoirs not "*heretofore* constructed in whole or in part by the Army engineers," can be utiiized "hereafter" only by complying with the terms of Section 8.

Thus, the Petitioners' reading of "Hereafter" is wholly untenable.[31] The most reasonable interpretation fully supports the application of Section 8 to projects authorized in Section 9. Indeed, the closing comments of Rep. Curtis of Nebraska upon passage of the Act demonstrate that Section 8 is integrally tied to Missouri Basin projects. (*See* 90 Cong. Rec. 9284-9285).[32]

However, ETSI argues that Congress would not have required subsequent authorization for irrigation works

---

[31] Further proof that a common sense reading of "hereafter" is correct is provided by Section 7 of the Act, which is structured similarly to Section 8. (App. at 2a.) Like Section 8, Section 7 begins with the term "Hereafter." Under ETSI's reading of that term, Section 7 would apply *only* to Section 10 projects, or projects authorized in subsequent enactments. The Secretary of the Army thus would lack the authority to prescribe and enforce regulations for the use of water for flood control and navigation purposes at federally funded projects in the Missouri River Basin and elsewhere. Such a reading of "Hereafter" is absurd; it would strip the Army of the core authority that no one disputes: the authority to control flood control and navigation.

[32] The entire debate over the Act is riddled with exchanges demonstrating that Congress assumed both Section 8 and Section 6 to be integral parts of the Act. *See, e.g.*, 90 Cong. Rec. 4133-4134, 8548-8549 (discussions of interplay between Sections 6 and 8 in the context of Missouri Valley development).

already contemplated in the Pick-Sloan plan. ETSI Br. at 38-39. This contention ignores the purpose of the Congress to protect existing users of water; it also overlooks the historical context of the 1944 Act.

Congress intentionally designed Section 8 to limit Interior's unfettered discretion in water marketing by including protections for existing users of main stem Missouri River water similar to those enacted in Section 6. Thus, before the Interior Secretary can apply reclamation law to irrigation works at the Army's main stem reservoirs, Section 8 requires (1) Army's approval of the attendant water diversion, *and* (2) specific authorization of the irrigation work by the Congress. By freeing Interior from the need to obtain these prior approvals in this case, ETSI's theory would avoid these protections.

Moreover, this theory ignores important facts. The Flood Control Act was designed, in part, to provide a backlog of projects to ease unemployment after the end of World War II. (90 Cong. Rec. 4122). Aside from the uncertainty in December 1944 as to when the war would cease, Congress knew that there would be a predictable delay between initiation of project construction, and project completion.[33] Thus, Congress prudently withheld specific authorization until that future time when it could re-evaluate the economic need for large-scale irrigation. The effective deauthorization of irrigation works at Oahe in 1982 demonstrates Congress' skepticism over the need for irrigation there.

In conclusion, there is every reason to suppose that Congress meant what it plainly stated in Section 8.[34]

---

[33] For example, the Corps' Colonel Reber advised the Congress that even after a dam was completed, it would take four or five years to fill the reservoir. *Senate Hearings* at 737. As it happened, Oahe itself was not completed until 1962. 128 Cong. Rec. 16610 at Table II (1982).

[34] The only authorities relied upon by petitioners to support the substance of their argument do not aid them. ETSI invokes *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D.

Certain dams authorized in Section 9 were to be operated under the direction of the Army. No irrigation could take place at these dams except under the provisions of Section 8, which required Interior first to receive Army approval and Congressional authorization, and then to build the additional works necessary for irrigation. Absent these events, Interior was granted no irrigation authority at such dams, and the reclamation laws do not apply.[35]

C. Section 6 Places The Authority To Define And Control "Surplus Water" Solely In The Army At Oahe Reservoir

Petitioners seek to avoid the plain force of Section 6 in two inconsistent ways. ETSI and the *amici* argue that

---

Mont. 1976), *aff'd in part and rev'd in part sub nom, Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979). ETSI Br. at 21 n.14. However, the reservoirs in question there were constructed and operated by Interior, not the Army. (Pet. App. 54a.) ETSI additionally relies upon a 1958 opinion of the Attorney General, 41 Op. Att'y Gen. 377 (1958) ETSI Br. at 22. But the 1958 Attorney General opinion analyzed whether *irrigation* use was subject to the reclamation laws, even though additional irrigation works were not required. *Id.* at 377-378. Because the ETSI use would not constitute an "irrigation benefit" the Opinion does not aid ETSI here.

The government does not rely upon the Op. Att'y Gen., but both it and ETSI cite *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121, *reh'g denied*, 430 U.S. 976 (1977). Insofar as *Tulare Lake* could be read to suggest that the reclamation laws would apply to a Corps reservoir with an irrigation function, the Congress destroyed that inference in Section 8 of the Reclamation Reform Act of 1982. The Senate Committee Report on that Act makes it clear that the reclamation laws do not apply to Corps projects that lack irrigation works. S. Rep. No. 373, 97th Cong., 2d Sess. 16. (App. 22a-23a.) In addition, in the debate preceding passage of the Act, both Senator Johnston and Senator Cochran stated that Section 212(a) of the 1982 Act is designed to reject *Tulare Lake's* interpretation, and to make clear that the law was always to the contrary. 128 Cong. Rec. 16612-13 (1982). Therefore, that case has no precedential effect.

[35] As demonstrated at pages 41-42, *infra*, Congress re-confirmed this intention in the Reclamation Reform Act of 1982.

the Army lacks authority to supply "irrigation water" from Oahe, and that the water will be forever "locked up" by the decision below. The government contends, however, that both Army and Interior can and should be permitted to enter such contracts. In fact, neither of these positions is supported by the language, legislative history or policies of the Flood Control Act.

1. *The Army Has Sole Authority To Determine What Water Is "Surplus" And Available For Industrial Uses At Oahe*

ETSI, but not the government, contends that water "earmarked" for irrigation cannot be "surplus" under Section 6, and therefore, that unless the Interior can contract for such water, it will remain unused. ETSI Brief at 30 n.21.[36] However, as demonstrated at pages 22-26, *supra*, no water at Oahe is currently "reserved" for irrigation under Section 8. Moreover, in response to a question in debate, Senator Overton confirmed that under Section 6, the Army is empowered to determine whether there is surplus water at Army dams, to decide the amount thereof, and to dispose of that water. 90 Cong. Rec. 8231. And Representative Whittington stated that Section 6 of the Act was intended to "apply only to waters that were surplus and *not needed* for irrigation or other purposes." (emphasis added.) *Id.* at 4134. Under this definition, Section 6 plainly would allow Army to determine that the water petitioners now claim is not

---

[36] ETSI incorrectly cites the remarks of Representative Curtis to argue that water at Oahe was "earmarked" for irrigation, and therefore could not be considered "surplus water" under Section 6 (which was numbered Section 4 in the House). ETSI Br. at 30 n.21. In his remarks, Representative Curtis answered the question whether water *appropriated under state statutes* for irrigation use can be considered "surplus water." He stated: "*[W]ater appropriated for irrigation* is not surplus water." 90 Cong. Rec. 4133 (1944). Those remarks do not suggest that the Act itself "earmarked," water for irrigation. To the contrary, they suggest that the procedure of appropriation is a necessary step in creating "irrigation water."

needed for irrigation at Oahe is in fact "surplus" and available for marketing.

ETSI also suggests that the Army's regulations defining "surplus water" prevent it from supplying any substantial amount of water for industrial use. ETSI Br. at 30 n.21. This contention, however, is not an argument that Section 6 does not grant authority to Army to contract for industrial use subject to the protections set out therein.[37] It is simply a complaint about the limitations ETSI perceives in Army's approach under the statute. But this complaint hardly justifies circumventing Section 6 by fabricating a concurrent authority in Interior. In any event, the Army General Counsel's recently-rendered opinion deprives these suggestions of any factual base.[38]

---

[37] *Amici* separately suggest that the protections of Section 6 are overriden by the provisions of Section 1 of the Act. This argument is incorrect. Indeed, Sections 1(a) and 1(c) confirm the congressional intention to require consultation by Army and Interior with interests affected by the construction and operation of the Missouri River Basin projects. In addition, Section 1(b) plainly cannot be viewed as overriding the protections vested in Army in Section 6, particularly when its chief sponsor, Senator O'Mahoney, himself authored an amendment that would have granted Army complete control over all Missouri River Basin projects. 90 Cong. Rec. 8548 (1944).

[38] In this opinion (which is identified for the first time at Fed. Br. 38-39 n.58 and is reprinted in the Appendix to this brief), the Army General Counsel emphasizes the Army's authority under Section 6 of the 1944 Flood Control Act: (1) to declare all waters at Army reservoirs that he deems are not needed to fulfill an authorized project purpose to be "surplus" waters available for industrial use; and (2) to make reasonable reallocations of waters currently being used for authorized project purposes (such as hydropower) for sale for industrial use. (App. 13a-15a.) This new opinion shows that while the Army believes the Interior Secretary cannot act independently to market Oahe water for industrial use (J.A. 135 n.*), the Army also believes itself to be free under Section 6 unilaterally to provide for such use even if the water so used would otherwise serve an authorized project purpose. Subject to the provision in Section 6 that requires Army to protect existing uses of the Missouri River, this new Army interpretation clearly would

2. *Concurrent Authority Over Industrial Uses Would Destroy The Congressional Division Of Authority At Main Stem Dams*

Recognizing that the Army is authorized to contract for precisely the same use that Interior seeks to control, the government attempts to defend a system of concurrent authority. Fed. Br. at 37-39. However, granting two agencies the authority to contract for the same use of the same water would be not only manifestly impractical, it would violate the division of authority established by the Congress.

First, rather than "maximiz[ing] the effectiveness of the multiple purpose reservoirs," Fed. Br. at 39, concurrent jurisdiction would create an unstable management, where neither agency has the final say on whether "surplus" water exists, and whether a contract for its industrial use is desirable. As Senator Overton's comments make clear, the right to define "surplus" water is a necessary incident of main stem reservoir control properly vested in the Army by Section 6. (90 Cong. Rec. 8231). Senator O'Mahoney confirmed Army's right to control "disposal of waters behind dams it has built" in 1952 when Congress re-enacted Section 6 to correct an inadvertent repeal. 98 Cong. Rec. 3802 (1952). In fact, Army currently exercises that right in its daily opera-

---

allow water stored behind the main stem dams and not in use for irrigation to be used for industrial purposes.

Army's new interpretation of the term "surplus" water under Section 6 resolves an "essential difference" between the majority and the dissent in the court of appeals. (Pet. App. 43a n.7.) As to the undeniable impact of this new opinion, the government can only say that Army has not "to date" acted upon it at Oahe. Fed. Br. at 38-39 n.58. But this assertion does nothing to avoid the fact that in this new opinion Army has plainly asserted its intention to accommodate the use for which Interior seeks implied competing authority under the Act. Thus, contrary to the government's contention, Fed. Br. at 49, there simply is no need for Interior to decide whether it has the unilateral authority it seeks here; Army plainly believes that it (and not Interior) has that authority, and Army intends to use it.

tional control over the main stem reservoirs. (See pp. 12-13, *supra*).

Further, the fact that the two agencies are guided by different statutory concerns ensures inter-agency disputes over such water contracts. Interior must only consider whether a water supply contract would impair the function of irrigation, whereas the proviso to Section 6 requires the Army to determine more generally whether the contract would "adversely affect then existing lawful uses" of water. *Compare* 43 U.S.C. § 521 *and* 43 U.S.C. § 485h(c), (App. 6a, 8a), *with* 33 U.S.C. § 708 (App. 2a). Obviously, a water supply contract may not impair local irrigation by Interior (especially at Oahe, where there is no Interior irrigation) but may still adversely affect other uses, such as downstream consumption. But under petitioners' theory of concurrent jurisdiction, Interior would remain free to conduct its activities at Oahe without regard to their effect on the activities which impelled construction of the dam, certainly not the result Congress contemplated when enacting the Section 6 protections.[39]

III. The Legislative History Of The 1944 Act, As Well As Subsequent Actions Of The Congress, Confirm That The Interior Secretary Lacks The Authority He Seeks

The plain language of the Flood Control Act of 1944 settles the question presented here. Therefore, examination of the legislative history is appropriate to determine "only whether there is 'clearly expressed legislative intention' contrary to that language." *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1213 n.12 (1987) (citations omitted). In this case, the legislative history of Interior's failed efforts to amend Sections 6 and 8 of the 1944 Act strongly confirms that the Act does not authorize Interior to execute the ETSI contract. Moreover, in the Reclama-

---

[39] The court of appeals so concluded: "It seems incongruous, however, to hold that, in a statutory scheme which attempts to demarcate the jurisdiction of agencies with potentially competing interests, Congress would authorize both agencies to contract for water from the same pool for industrial purposes." (Pet. App. 31a.)

tion Reform Act of 1982, the Congress rejected the petitioners' theory that reclamation law can apply implicitly to Army reservoirs which lack Interior irrigation works.

A. Congress Rejected Efforts By The Interior Secretary And His Allies To Amend Section 6 And Obtain The Authority He Now Seeks During Deliberations Over The 1944 Act

The Interior Secretary was specifically denied authority of the type he now seeks during congressional deliberations on Section 6 (which was numbered Section 4 in the House). In a June 2, 1944 letter to the Senate Commerce Committee, Interior Secretary Ickes requested that a specific provision be added to the end of Section 6 in order to secure authority for Interior to market surplus water for industrial uses from Army reservoirs used for irrigation.[40] This provision, however, was not included in the 1944 Act. Petitioners so concede. Fed. Br. at 10 n.15 and 11 n.17; ESTI Br. at 43.[41]

Additional legislative history of Section 6 also makes it clear that the Interior Secretary lacks the authority he now seeks. For example, the House defeated an amendment that was even more expansive of Interior authority

---

[40] Interior's proposed language read as follows:

Provided, That the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pursuant to section 6 of this Act . . . . Senate Hearings at 312-313 (Letter from Harold I. Ickes, Secretary of the Interior to Senator Josiah W. Bailey, Committee on Commerce, June 2, 1944).

[41] ETSI notes that Interior Secretary Ickes did not pursue this amendment after Senator Overton reminded him that language covering the applicability of reclamation law had already been inserted in the companion Rivers and Harbors Bill (in an amendment identical to Section 8). *See Senate Hearings* at 458. However, ETSI's conclusion—that the Senate had no intention to deny the Secretary that authority—is flatly belied by the subsequent floor debate over the Rivers and Harbors bill itself. In that debate, Senator Overton stated that the intention of Section 8 was to prevent Interior from initiating any work at Army reservoirs to dispose of surplus water without prior Congressional authorization. 90 Cong. Rec. 8675 (1944).

than the one later rejected by the Senate. This amendment provided that the reclamation laws would govern the use of waters for industrial purposes at any reservoir (such as Oahe) located west of the 97th meridian. 90 Cong. Rec. 4197 (1944). But Representative Whittington attacked the amendment, and it was rejected on the House floor. *Id.*

The Senate also rejected an amendment proposed by Senator Murray of Montana which would have shifted control of Oahe and other Missouri Basin Army projects to the Bureau, and would have applied the reclamation laws to *all* activities, not just irrigation. *Id.* at 8616, 8626.

The uniform rejection of these amendments demonstrates that Congress did not intend to authorize the Interior Secretary to undertake actions such as the ETSI water service contract.[42] *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200-01 (1974); *See National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971) (congressional rejection of limiting amendment clearly reflects legislative intent).

---

[42] The government and ETSI argue that Interior already enjoyed authority to market water for industrial use at Army reservoirs, and that the defeat of the Secretary's amendment merely denied the agency's effort to obtain exclusive authority. Fed. Br. at 47-48 n.71; ETSI Br. at 18-19, 43-44. This is flatly incorrect. In explaining the House version of Section 6, Representative Whittington stated that "under the reclamation acts and in the distribution of water under those acts, *the Secretary of the Interior has the power to do in reclamation districts just what the Chief of Engineers would have power to do [under Section 6] in reservoir districts.* This is to make *comparable* the powers exercised by the Director of Reclamation and engineers." 90 Cong. Rec. 4134 (1944). (Emphasis added.) Later, Representative Whittington emphasized that "the purpose of [Section 6 of the Act] in no way involves reclamation." *Id.* at 4197.

In addition, when Congress re-enacted Section 6 in 1952 (to correct an inadvertent repeal), Senator Case stated that the Section "put the Secretary of [Army] . . . *on all fours with the Secretary of the Interior with respect to their power to deal with dams and reservoirs under their control.*" 98 Cong. Rec. 3801-3802 (1952) (emphasis added).

B. Congress Designed Section 8 Of The 1944 Act To Avoid A Grant Of Authority To The Interior Secretary Over A Block of Water Stored At Army Reservoirs

The legislative history of Section 8 is equally devastating to the petitioners' argument. Drafted in the House (and numbered Section 6 there), this Section originally would have granted Interior express authority to "prescribe regulations under existing reclamation law for the use of storage" in Army reservoirs. The Senate, however, radically narrowed the scope of Interior's authority in amending House Section 6 and formulating Section 8 of the Act. See 90 Cong. Rec. 8233-8241, 9279 (1944).[43]

---

[43] The differing House and Senate versions of Section 8 of the Act follow:

Section 6 of the House Bill *(deleted by the Senate)*	Section 8 of the Senate Bill *(substituted for House Section 6 and enacted into law)*
Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary can be consistently used for reclamation of arid lands, *it shall be the duty of the Secretary of the Interior to prescribe regulations under existing reclamation law for the use of the storage available for such purpose*, and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said storage; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts.	Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, *the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws* (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof), *such additional works in connection therewith as he may deem necessary for irrigation purposes*. Such irrigation works may be undertaken only . . . after subsequent specific authorization of the Congress by an authorization Act . . . .

Misapprehending Sen. Overton's observation that Section 8 allows Interior merely to *distribute* irrigation water, (90 Cong.

Both the district court and the court of appeals noted the significant difference between these two versions, and concluded that they demonstrate the limited authority of the Interior Secretary at Army reservoirs. (Pet. App. 26a-27a; 60a-61a.) The provision proposed by the House focuses on extending the Secretary's power over water stored in the reservoirs; in the provision actually adopted (Section 8), the focus shifts completely out of the reservoirs, to the works needed to distribute water, and a requirement for prior specific congressional authorization is added.[44] Since the Senate version prevailed in confer-

---

Rec. 8625-2626), the petitioners rely extensively on the debate over the rejected House version of Section 8. Fed. Br. at 8 n.11, 25-26 and nn.42-43; ETSI Br. at 17, 42 n.32. But statements on the House floor of members' intention to authorize Interior control over storage are of no value in light of the very significant amendment of that Section in the Senate. If anything, they provide excellent indications that the statute as passed did not contain such a grant. *Interstate Natural Gas Co. v. FPC*, 156 F.2d 949, 952 (5th Cir. 1946), *aff'd* 331 U.S. 682, *reh'g denied*, 332 U.S. 785 (1947).

[44] Petitioners argue that Section 8 was recommended by the Interior Secretary for "technical" or "clarification" reasons, and imply that the adoption of Section 8 thus cannot logically be interpreted to limit his authority. Fed. Br. at 11 n.17, 28 n.45, 47-48 n.71; ETSI Br. at 40-41. This suggestion, too, is plainly incorrect. Indeed, Congress made a significant change in the language of Section 8 that had been proposed by Interior: it inserted the requirement of subsequent *specific* congressional authorization for any further works constructed by the Secretary. *Compare* proposal of Secretary Ickes at *Senate Hearings* at 313 *with* Section 8 (App. 2a-3a). Although Senator Overton noted that Section 8 as proposed by the Senate faithfully reflected the changes proposed by the Interior Secretary, 90 Cong. Rec. at 8314-8315, he also emphasized that the version proposed by Secretary Ickes had not provided for prior congressional authorization in a colloquy with Senator Hatch during discussion of the terms of Section 8 as they were inserted *verbatim* into the companion Rivers and Harbors Bill. *Id.* at 8674-8675. For a frank acknowledgement that the substitution of Senate Section 8 for House Section 6 was "controversial," see the comment of Senator Milliken at 90 Cong. Rec. 8233.

ence, the Senate's intent is controlling.[45] These significant alterations destroy the argument here that the Interior Secretary now enjoys authority to control and dispose of the water stored in Army reservoirs. *See Cardoza-Fonseca*, 107 S.Ct. at 1215 n. 17 (where provision relied upon for statutory construction was rejected, that language does not govern); *Pan Am World Airways, Inc. v. CAB*, 380 F.2d 770, 781 (2d Cir. 1967), *aff'd* 391 U.S. 461, *reh'g denied*, 393 U.S. 957 (1968) (specific rejection of one house's version in final adoption is "extremely significant.")

C. Congress Rejected Any Inference That Interior Could Exercise Control Over Army Reservoirs In The Absence Of Explicit Statutory Language Or The Construction Of Irrigation Works In The Reclamation Reform Act Of 1982

Following extensive efforts, Congress enacted the Reclamation Reform Act of 1982, P.L. 97-293, 96 Stat. 1261, in order to provide "a modern statement of congressional policy on the programs and related administrative efforts carried out pursuant to the Federal reclamation law." S. Rep. No. 97-373, 97th Cong., 2d Sess. (1982) 6-7 (App. 21a). That Act administers the legislative *coup de grace* to the petitioners' theory that the reclamation laws apply to Oahe.

A chief purpose of the 1982 Act was to resolve a controversy that had arisen under Section 8 of the Flood Control Act of 1944. *Id.* at 11 (App. 21a). In the 1982 Act the Congress rejected efforts by Interior to apply reclamation law to irrigators who were drawing water from Army reservoirs. In so doing Congress underscored its intention that Section 8 of the 1944 Act was *not* to be construed to allow reclamation law to apply at such reservoirs absent explicit statutory designation of that reser-

---

[45] According to the Conference Report, the House's language was rejected and the Senate's language was adopted and became Section 8 of the 1944 Act. Conference Report, 90 Cong. Rec. 9279 (1944) (Amendment No. 17).

voir as a reclamation project, or absent the construction of project irrigation works. 43 U.S.C. § 390*ll*(a)(1), (2). (App. 7a.)[46]

Thus, the 1982 Congress confirmed that, under Section 8 of the 1944 Act, the authority of Interior to apply reclamation law at Army projects in the absence of explicit statutory language is entirely dependent upon the question whether Interior has constructed irrigation works. (Pet. App. 30a n. 21.) As it is not disputed that no such works have been constructed at Oahe, Interior cannot exercise any industrial water marketing authority under the reclamation law at that reservoir, and the ETSI contract is invalid.[47]

---

[46] The Senate Report accompanying the 1982 Act emphasizes Congressional intent that "Section 8 of the Flood Control Act of 1944 did not, in and of itself, make the reclamation law applicable to any specific project." (App. 22a.) It also states its purpose "to eliminate the shadow of applicability of reclamation law to Corps of Engineers projects in any case in which the intent of Congress concerning such applicability is not clearly and explicitly set forth in statutory language." (App. 23a.)

[47] The petitioners suggest that Section 212(b) of the Reclamation Reform Act of 1982 indicates congressional assent for the exercise of Interior authority at Oahe. Fed. Br. at 48-49 and n.72; ETSI Br. at 26-27. This suggestion ignores both the language of the Act and its legislative history. The Act first defines "*irrigation water*" as "water made available *for agricultural purposes from the operation of reclamation project facilities.*" 43 U.S.C. § 390 bb(5) (emphasis added). (App. 21a.) The Committee Report then explains that Section 212(b) "has been included in the bill to insure that the Secretary's authority to contract with water user entities for the *irrigation water* deliveries from Corps of Engineers projects . . . continues in effect." S. Rep. No. 97-373 at 16 (emphasis added). (App. 23a.) Thus, in Section 212(b), the Congress merely confirmed Interior's authority to market water from irrigation facilities for agricultural use. Furthermore, neither Interior nor the Army provided comments that would have alerted the 1982 Congress to the ETSI contract. Commissioner Broadbent's statements suggest only that Interior's authority to contract for *irrigation water* supplies would remain intact—the same point covered in 212(b). 128 Cong. Rec. 16607 (1982). General Heiberg's May 18 and June 18, 1982 letters were both written *prior* to execution of the ETSI contract, and in any event noted only that "the

IV. The Interpretation Of The Flood Control Act of 1944 Advanced By The Interior Secretary Is Not Entitled To Deference For The Reason That It Conflicts Squarely With The Act's Plain Language And Legislative History As Well As With Contrary Interpretations By The Army And By Interior Itself

As a final effort to validate the ETSI contract, the petitioners argue that Interior's interpretation of Section 9 of the Flood Control Act of 1944 is entitled to deference. Fed. Br. at 44-50; ETSI Br. at 32-37. But this is not a case in which the deference principle applies.

This Court has repeatedly made clear that deference to an agency interpretation of statutory language is appropriate where three conditions are met: first, the statute being construed must lack any clear guidance on the issue; second, the agency offering the interpretation must enjoy unquestioned authority to administer the program in question; and third, the agency's construction must be permissible, reasonable and consistent with the statute itself. *E.g., Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, *reh'g denied*, 468 U.S. 1227 (1984); *Japan Whaling Association v. American Cetacean Society*, No. 85-954, slip op. at 11 (U.S. June 30, 1986). Not one of these conditions is satisfied in this case.

Thus, as an initial matter, Section 6 of the 1944 Act speaks directly to the precise issue presented here by declaring that it is the Secretary of the Army (not the Interior Secretary) who enjoys the authority to market for industrial use water that is considered surplus to main stem project purposes. Given this fact, it is the Army, not Interior, that has been unambiguously empowered by the 1944 Act to make determinations as to the availability of water at Oahe for industrial use.[18]

United States" (not the reclamation fund) would receive revenue from industrial water contracts from main stem reservoirs. *Id.* at 16610. Thus, his letters could not possibly have referenced the ETSI contract, as ETSI states, nor could they be construed as notifying the Congress that Interior, rather than Army, was contract-

In the teeth of Section 6, ETSI (but not the government) argues that the Congress never considered the issue of how to dispose of "unused irrigation water." ETSI Br. at 33-34.[49] This argument ignores the statements of Senator Overton and Representative Whittington that show Congress fully intended that water not used for irrigation be considered "surplus" under Section 6. 90 Cong. Rec. 8231, 4125 (1944). In fact, Rep. Whittington expressly stated that Section 6 of the Act "would apply only to waters that were surplus and not needed for irrigation and other purposes." 90 Cong. Rec. 4134 (1944). As the 1986 Army General Counsel opinion concludes after examining these passages from the congressional debates, water from a main stem Missouri River reservoir that is not currently in use for irrigation "*surely* can be considered surplus water within the meaning of Section 6." (emphasis added). (App. 14a-15a.)

---

ing for industrial use, or as advising the Congress of the statutory basis for such contracts.

[48] Surely, the Interior Secretary recognized this fact in 1975 when he felt constrained to enter into the MOU with the Army. If the Army had no such Section 6 power, and if Interior was as confident then as it claims to be now of its implied Section 9 authority, Interior presumably would have felt no need to sign the MOU. (*See* Pet. App. 68a.)

[49] ETSI asserts that Congress never defined the term "reclamation developments," and reduces the "precise question" in this case to the question "whether . . . developments should include stored irrigation water in the absence of irrigation works." ETSI Br. at 33. Aside from the plethora of legislative history that illustrates the understanding of Congress and Interior that the term "reclamation developments" meant physically-constructed projects (not mere storage of undefined quantities of water), see pp. 26-27, *supra*, this analysis misses the point altogether. Plainly, the central question in this case is whether the Congress authorized Interior to market water for industrial uses from Army reservoirs in the absence of Interior irrigation works. Congress answered that question decisively in the negative in Sections 6, 8 and 9. ETSI's approach simply ignores the maxim that statutes must be read consistently as a whole, without placing excess emphasis on any one provision or phrase. *United States v. Morton*, 467 U.S. 822, 828, *reh'g denied*, 468 U.S. 1228 (1984); *Van Dyke v. Cordova Copper Co.*, 234 U.S. 188, 191 (1914).

Nor is Interior empowered with unfettered discretion to administer any plan for industrial use of water from main stem reservoirs such as Oahe. To the contrary, as demonstrated in Parts I and II, and wholly aside from the clear grant of such power to the Army in Section 6, any grant of such authority to Interior arising from Section 9 is inferential at best, and is in any event constrained by the procedures of Section 8 requiring prior Army approval and Congressional review.[30] Moreover, such an inference produces irreconcilable conflicts with the central intention of Congress in 1944 to divide authority between the Army and Interior, to prevent overlapping jurisdiction over projects in the Missouri River Basin, and to protect existing users of water.

In addition, the construction advanced by Interior has been challenged consistently by the Army. In 1974, the Acting Army General Counsel stated that Interior did not

---

[30] This fact plainly distinguishes the cases relied upon by petitioners. Unlike this case, in the petitioners' cases the statute under review unequivocally empowers the agency offering the interpretation to administer the program in question. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 106 S.Ct. 1931, 1935, 1938-39 (1986) (review of FDIC interpretation of its enabling laws); *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 457 and n.7 (1986) (review of Corps interpretation of Clean Water Act provision that expressly empowered Corps to control permits affecting wetlands); *Chemical Manufacturers Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 118 n.2 (1985) (review of EPA interpretation of provision of Clean Water Act that expressly directed EPA to administer its terms). For example, in the case cited prominently by ETSI, *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986), this Court deferred to an interpretation by the CFTC of its own enabling statute (the Commodities Exchange Act) only after noting that the interpretation was a "longheld position" which was "well within the scope of its delegated authority." *Id.* at 3254. Similarly, in *United States v. City of Fulton*, 106 S.Ct. 1422 (1986), this Court deferred to an interpretation of Section 5 of the 1944 Flood Control Act by the Secretary of Energy after emphasizing that there was no question concerning the existence of his authority to administer the program under review. *Id.* at 1426-1427. In this case, the existence of that authority is precisely the question presented.

enjoy independent authority to market water for industrial use without Army approval. (J.A. 135 n. *.) In 1975, Secretary of the Army Callaway advised Interior Secretary Morton that the authority question was in need of congressional clarification. (J.A. 142.) In connection with consideration of the provision of the Reclamation Reform Act of 1982 that rejects Interior's theory, the Deputy Assistant Secretary of the Army for Civil Works advised the Congress that "[i]t is the position of the Department of the Army that [43 U.S.C. § 390*ll*] is a concise statement of the scope of coverage that Congress has consistently intended for Federal reclamation requirements at Corps of Engineers projects." Letter of July 15, 1982 from Robert F. Dawson to Senator McClure (128 Cong. Rec. 16614 (1982)). More recently, the 1986 Army General Counsel opinion reemphasizes the Army's power to market water for industrial use from main stem reservoirs.[51] (App. 12a-15a.) Under these circumstances, Interior's construction of the 1944 Act plainly does not warrant deference.

Petitioners argue at length that the Flood Control Act was designed to promote flexible development of water resources in the Missouri River Basin, Fed. Br. at 4-6, 15-16, 36; ETSI Br. at 15-16, 29, and note that the Interior Secretary was directly involved in its creation. These facts, however, say nothing about *how* such development was to proceed, nor about the importance of clearly dividing authority between the Army and Interior to ensure an efficient development plan that would protect existing uses on the main stem of the Missouri.[52]

---

[51] The government now suggests in passing that the ETSI contract is "acceptable" to Army. Fed. Br. at 46. This suggestion is inconsistent with Army's previously expressed views, which correctly recognize its duties under Section 6 and Section 8, and ignores the fact that Army has not delegated its authority to Interior. (*See* Pet. App. 15a-17a and n.9, 70a.) In short, this suggestion cannot rescue the *ultra vires* ETSI contract. *Id.*

[52] Notably, while promoting "optimal development", ETSI and the government are conspicuously silent on the congressionally

Nor do they explain the specific rejection by Congress of the Interior Secretary's efforts to amend Sections 6 and 8 to provide him the authority he now seeks.[53] That rejection precludes deference here. *See Cardoza-Fonseca*, 107 S.Ct. at 1215 n. 17.

Petitioners also suggest that Interior has consistently advanced the position it now argues. Fed. Br. at 47-48; ETSI Br. at 20-24. This suggestion simply is not correct. Opinions and statements authored by Interior officials in 1946, 1950, 1957 and 1981,[54] as well as the execution of

---

recognized need to protect existing users from withdrawals occasioned by industrial use. Instead, they complain that the rulings below would require the construction of "pointless" irrigation works as a prerequisite to Interior's assertion of industrial water marketing authority. ETSI Br. at 30. *See* Fed. Br. at 38. These contentions, too, miss the point. Congress plainly required specific authorization of such works in Section 8 as a prerequisite to the exercise of Interior authority at Army reservoirs precisely to prevent the sort of unfettered power to promote industrial diversions of the type the petitioners seek here. Indeed, the reclamation laws themselves, as underscored in the Reclamation Reform Act of 1982, show that the Congress considers the presence of Interior-constructed irrigation works to be a key factor in determining whether Interior can apply the reclamation laws. (See pp. 41-42, *supra*.)

[53] Inexplicably, the government states that "there is no reason to doubt" that Reclamation Commissioner Bashore and Interior Secretary Ickes expected that Pick-Sloan approval granted "authority over water stored for irrigation at the main stem reservoirs." Fed. Br. at 47. To the contrary, there is *every* reason to doubt this assertion. Commissioner Bashore specifically advised the Congress during hearings in 1943 on H.R. 4485 that it was the Bureau's intention merely to seek to exercise jurisdiction over reservoir water *after* it was released to the distributing system. *House Hearings* at 646. And Secretary Ickes' repeated but unsuccessful efforts to obtain such authority speak for themselves.

[54] The Bureau's Assistant Chief Counsel declared in a 1946 opinion that the provisions in Section 9(c) refer "exclusively to power developments undertaken by the Secretary of the Interior *at dams which he is authorized to construct*." *See Missouri Basin*

the MOU itself in 1975, contradict the claim advanced here (*see* Pet. App. 68a). This lack of internal agency consistency further undermines Interior's claim to deference. *Cardoza-Fonseca*, 107 S.Ct. at 1221 n. 30.

Even the unpublished 1974 memorandum from the Interior Solicitor which constituted the only stated basis for execution of the ETSI contract provides little comfort. That opinion was a conclusory interpretation advanced thirty years after passage of the Act that failed to mention the express grant of authority to the Army contained in Section 6, the provisions of Section 8, or the failed efforts by Secretary Ickes to obtain similar authority. Accordingly, that opinion provides no basis for deference. *See Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 745-746 (1973).

As for the claim that Congress somehow approved the ETSI contract in 1975 hearings, that contention is groundless. The 1975 hearings were in large part a con-

---

Water Problems: Joint Hearings Before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Public Works, 85th Cong., 1st Sess. Pt. 1 (1957) 367, 390 (emphasis added). Likewise, the Interior Solicitor stated in a 1950 opinion that "subsection (a) of Section 9 was intended *only* to allocate the construction of the several parts of the Missouri River Basin project between the Bureau of Reclamation and the Corps of Engineers; that subsection (b) was intended to apply to the parts of the projects which were to be constructed by the Corps of Engineers; and that *subsection (c) was confined to the parts of the project which were to be constructed* by the Secretary of the Interior." *Id.* at 369. (emphasis added.) In 1957, Interior's Assistant Solicitor advised the Congress that Interior did not consider the main stem reservoirs to be "reclamation developments" constructed by the Bureau. *Id.* at 318-319. And in 1981, Reclamation Commissioner Broadbent advised Congress that: ". . . Under Section 8 of the [1944] Flood Control Act, *only projects that provide irrigation benefits are subject to Reclamation law.*" *Reclamation Reform Act of 1981: Hearings Before the Senate Committee on Energy and Natural Resources*, 97th Cong., 1st and 2d Sess. (1981-1982) 569 (letter from Commissioner Broadbent) (emphasis added).

certed attack on Interior's assertion of authority to market water from main stem reservoirs for industrial use.[55] Thus, contrary to the petitioners' suggestion, the 1975 hearings simply did not approve the Secretary's alleged authority. In fact, by contrast to the congressional silence that followed the 1975 hearings, enactment of Section 212(a) of the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll*(a), suggests that Congress has conclusively rejected the petitioners' theory. *Schor*, 106 S.Ct. at 3255.

---

[55] During the hearings, Senator Abourezk questioned representatives of the Department of the Interior closely concerning their authority to market water from the upper Missouri Basin, and expressed a belief that such authority might be "subject to legal challenge." *Missouri River Basin Industrial Water Marketing: Hearing Before the Senate Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975) at 50-51. (*See* Pet. App. 35a.) Even if the text of those hearings were more helpful to their argument, it is well settled that testimony given to congressional committees should be given little weight, *see Sierra Club v. Clark*, 755 F.2d 608, 617 (8th Cir. 1985), and that after-the-fact congressional observations normally are given short shrift in statutory construction. *CPSC v. GTE Sylvania*, 447 U.S. 102, 117-18 (1980). Similarly, mere committee review does not constitute congressional authorization. *TVA v. Hill*, 437 U.S. 153, 191-92 (1978); *SEC v. Sloan*, 436 U.S. 103, 120-122 (1978); *see Libby Rod and Gun Club v. Poteat*, 594 F.2d 742, 746 (9th Cir. 1979). For these reasons, the 1955 comment from the Senate Committee on Interior and Insular Affairs concerning the purported authority of the Interior Secretary over irrigation storage, interjected during consideration of matters entirely unrelated to that question, Fed. Br. at 49, does not change the contemporaneous legislative history showing that Interior lacks authority under the 1944 Act to regulate such storage. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (comments in committee report written eleven years after enactment of the legislation in question insufficient to overcome clear evidence of congressional intent at time of enactment.)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WILLIAM E. WALTERS, III *
WALTERS & THEIS
2015 York Street
Denver, Colorado 80205
Attorney for the Iowa and Nebraska Chapters of the Farmers Educational and Cooperative Union of America

RODNEY M. CONFER
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
Of Counsel

* Counsel of Record

STEPHEN E. ROADY *
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700
Attorney for The Kansas City Southern Railway Company

RONALD J. WILSON *
SIERRA CLUB LEGAL DEFENSE FUND
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
Attorney for The Sierra Club

APPENDICES

APPENDIX A

Sections 5 through 9 of the Flood Control Act of 1944:

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the authorization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quanties for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any res-

ervoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided*, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to

irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands,

and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

APPENDIX B

Section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. § 485h(c)):

> (c) Furnishing water to municipalities; sale of electric power; lease of power privileges

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to coopera-

tives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 [7 U.S.C.A. § 901 et seq.]. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

APPENDIX C

Section 212 of the Reclamation Reform Act of 1982 (43 U.S.C. § 390*ll*):

§ 390*ll*. Corps of Engineers projects

(a) Applicability of Federal reclamation laws

Notwithstanding any other provision of law, neither the ownership or pricing limitation provisions nor the other provisions of Federal reclamation law, including this subchapter, shall be applicable to lands receiving benefits from Federal water resources projects constructed by the United States Army Corps of Engineers, unless—

(1) the project has, by Federal statute, explicitly been designated, made a part of, or integrated with a Federal reclamation project; or

(2) the Secretary, pursuant to his authority under Federal reclamation law, has provided project works for the control or conveyance of an agricultural water supply for the lands involved.

(b) Payment of construction, operation, maintenance and administrative costs allocated to conservation or irrigation storage

Notwithstanding any other provision of this section to the contrary, obligations that require water users, pursuant to contracts with the Secretary, to repay the share of construction costs and to pay the share of the operation and maintenance and contract administrative costs of a Corps of Engineers project which are allocated to conservation storage or irrigation storage shall remain in effect.

APPENDIX D

Act of February 25, 1920 (43 U.S.C. § 521)

SUBCHAPTER XIII—SALE OR LEASE OF SURPLUS WATERS, WATER POWER, STORAGE CAPACITY, AND WATER TRANSPORTATION FACILITIES

§ 521. Sale of surplus waters generally

The Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided*, That the approval of such contract by the water-users' association or associations shall have first been obtained: *Provided*. That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: *Provided further*, That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further*, That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied.

(Feb. 25, 1920, c. 86, 41 Stat. 451.)

APPENDIX E

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20310

13 March 1986

SAGC/Mr. Hoskins/pmd

MEMORANDUM FOR THE ASSISTANT SECRETARY
OF THE ARMY
(CIVIL WORKS)

SUBJECT: Proposed Contracts for Municipal and Industrial Water Withdrawals from Main Stem Missouri Reservoirs

This responds to your memorandum of 25 October 1985, requesting my views on the adequacy of two water withdrawal contracts. The contracts grant the city of Parshall, North Dakota (Parshall) and the North Dakota State Water Commission (NDSWC) privileges to withdraw water from Lake Sakakawea for municipal and industrial purposes.

Lake Sakakawea was formed by the waters of the Missouri River stored behind the Garrison dam. The Garrison dam is one of six Missouri main stem dams authorized by section 9(a) of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887. Pursuant to section 9(a), more commonly referred to as the Pick-Sloan Missouri River Basin Program, the six main stem dams are operated as a coordinated unit providing flood control protection, storage to enhance downstream navigation during prolonged droughts, hydropower storage, and storage of waters for irrigation.

The contracts provide that at a future date Parshall and NDSWC will agree to pay reasonable consideration

based upon benefits received. It is my understanding that the consideration will amount to a charge for reservoir storage needed to fulfill the withdrawal demands of Parshall and NDSWC. Parshall and NDSWC, as well as any future local users, will be charged only for storage that exceeds the amount of water that would have been provided by the natural flow of the Missouri River had the Pick-Sloan reservoirs not been constructed.

In my opinion section 6 of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, *codified at* 33 U.S.C. § 708, authorizes your office to enter into the proposed contracts with Parshall and NDSWC. Section 6 provides that:

> The Secretary of the Army is authorized to make contracts with states, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

At issue in the Parshall and NDSWC contracts is whether surplus water exists in Lake Sakakawea. Certain legal opinions from the Corps of Engineers suggest that water in the main stem reservoirs would not be available for municipal or industrial purposes so long as the water is otherwise being used, or could be used, for the purposes specifically identified in the Pick-Sloan program. Under this analysis there is no surplus water in Lake Sakakawea because all water not actually needed for irrigation or otherwise held within the reservoirs for navigation purposes, could eventually be discharged through the generators to produce hydroelectric power.

In my opinion, this interpretation of what constitutes surplus water is unnecessarily narrow. Under the authority of section 6 of the Flood Control Act, your office, acting for the Secretary of the Army, has broad discretion in marketing waters trapped in Corps of Engineers rservoirs. Congress made clear that section 6 of the Flood Control Act would give the Secretary of the Army authority equivalent to the authority of the Bureau of Reclamation pursuant to the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c). During congressional debate over section 6 of the Flood Control Act of 1944, the House bill's sponsor explained the purpose of section 6 as follows:

> Section [6] provides that if there is a town or a city or a municipality that needs an additional water supply—and water is just as essential for human beings as it is for crops—the [Secretary of the Army] shall have the right to provide that that water shall be used there for the purpose of supplying the needs of man. It strikes me that the provision is a power that now obtains under the reclamation law. If it obtains under the reclamation law, I know of no good reason why it should not obtain in the existing bill.

90 Cong. Rec. 4125 (daily ed. May 8, 1944) (statement of Rep. Whittington). Later in the debate Congressman Whittington added the following:

> My recollection is that under the reclamation acts, and in the distribution of water under those acts, the Secretary of the Interior has the power to do in reclamation districts just what the [Secretary of the Army] would have power to do in reservoir districts. *This [section] is to make comparable the powers exercised by the Director of Reclamation and the [Secretary of the Army] and would apply only*

> *to waters that were surplus and not needed for irrigation or other purposes.*

Id. at 4134 (emphasis added).

Federal reclamation law grants the Secretary of the Interior broad discretion in marketing water stored in Bureau of Reclamation reservoirs and electric power produced at those reservoirs. Section 9(c) of the Reclamation Projects Act of 1939, P.L. 76-260, authorizes the Secretary of the Interior to enter into contracts for municipal water supply and the sale of electric power or lease of power privileges. 43 U.S.C. § 485h(c). This authority is limited by the requirement that "[n]o contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." *Id.*

This provision has been interpreted to authorize the Secretary of the Interior to sell to municipal and industrial users water that was originally intended for use in irrigation but is not presently needed for that purpose. *See Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976) *reversed on other grounds Environmental Defense Fund v. Andrus*, 596 F.2d 848 (9th Cir. 1979); *see also State of Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984); *Review of Federal Marketing Practices*, Decision of Comptroller General, Sep 25, 1981, B-198376, B-198377, B-198378-O.M. (unpublished); *Clarification of Provisions of Water Supply Act of 1958 and the Reclamation Act of 1939*, Decision of Comptroller General, Nov 14, 1979, B-157984-O.M.

In my opinion section 6 of the Flood Control Act gives the Secretary of the Army similar authority to market water stored in the Pick-Sloan flood control reservoirs. The Reclamation Projects Act authorizes the Secretary of

Interior to reallocate and market water not needed to fulfill the paramount reclamation purpose of irrigation. Section 6 of the Flood Control Act provides the Secretary of the Army similar authority with regard to water he determines is not needed to fulfill a project purpose in Army reservoirs.

Courts have been deferential to the Secretary of Interior's determinations that the sale of water for municipal water supply does not impair the project's irrigation purpose. *Environmental Defense Fund v. Morton*, 420 F. Supp. at 1045. The legislative history of section 6 of the Flood Control Act implies that the Secretary of the Army's determinations with respect to water stored in Corps reservoirs are to be granted the same deference. In *United States v. 361.91 Acres of Land*, the district court held that:

> The function of carrying out the overall plan for the development of the Missouri River Basin has been delegated by Congress to the Department of [the Army] and Interior, and the Secretaries of those Departments have been vested with a wide discretion in carrying out such plan, and the courts have little or no authority to interfere with the exercise of that discretion.

Environmental Defense Fund v. Morton, 420 F. Supp. at 1043 *quoting United States v. 361.91 Acres of Land*, Civil No. 994 (D. Mont. 1965)

It is my understanding that none of the water stored in Lake Sakakawea is being withdrawn for irrigation purposes. Rather, discharges from Lake Sakakawea flow through the Garrison dam hydro-turbines to produce electricity. In my opinion the Secretary of the Army has the discretion to market water in Lake Sakakawea even if this results in a decrease of the project's actual or potential power production. Section 6 was included in

the Flood Control Act to empower the Secretary of the Army to make reasonable reallocations between the different project purposes.

During congressional debate on Section 6, Congressman Whittington stated:

> It happens in many cases that there is a need, as the War Department has reported to the committee, for water for human consumption because of the drying up of wells. If that need occurs in Ohio, or if that need occurs in Massachusetts, or in any other State, instead of requiring the local people in the first instance where there is inability in many cases to issue bonds and to incur large indebtedness to share in the construction of that reservoir, the purpose of section [6] is to enable the Government, the Secretary of War, and the Chief of Engineers to make a disposition of water there for human consumption or for any proper industrial use . . . . I submit Mr. Chairman, that if it be proper to provide for the storing of waters for reclamation to grow crops in the arid West, with which I am in sympathy, it ought to be all the more in order to provide for the storing of waters for human consumption.

90 Cong. Rec. 4197 (daily ed. May 9, 1944) (statement of Rep. Whittington).

This indicates an intention to put water needs for other human uses on a par with water needs for irrigation. That, in turn, would give the Secretary authority to balance such needs against the need for water for other purposes, such as hydropower, specifically identified in the Pick-Sloan program.

In the case of Lake Sakakawea the argument for making water available for these other human uses is even stronger. It was originally intended that water from the reservoir would be used for irrigation, but none is being

used for that purpose. That "unused" water, at least, surely can be considered surplus water within the meaning of section 6. Thus, section 6 gives the Secretary of the Army discretion to determine whether this water should be used to provide munincipal water supply, at least to the extent that his decision does not unreasonably impair the efficiency of the reservoir's other purposes. Cf. 43 U.S.C. § 485h(c).

Although arguably not required by section 6 of the 1944 Flood Control Act, I suggest that the Department of the Army and the Department of Interior enter into a memorandum of understanding outlining plans for present and future irrigation use of the Lake Sakakawea waters. This would facilitate a determination as to how much surplus water will be available for marketing. Documentation of the availability is desirable both for planning purposes and to ensure that the Army is not exceeding its section 6 authority.

Additionally, I suggest that the contracts be amended to incorporate the comments of Major General Hatch at paragraph 2d of his 16 October 1985 memorandum. Specifically, in order to make the draft contracts consistent with the form contract in ER 1105-2-20 Appendix B, the second WHEREAS clause should be modified to state that the contract is entered into under the authority of the 1944 Flood Control Act. Also, in the interest of minimizing any future disputes, Article 5 should explain the intended compensation formula. Similarly, Article 5 and 6 should explain that the water charge will not change over time except to reflect updated operation, maintenance, and replacement costs.

If we may be of any additional assistance in this matter, please do not hesitate to call.

/s/ Susan J. Crawford
SUSAN J. CRAWFORD
General Counsel

APPENDIX F

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
Washington, D.C. 20310-0103

24 Mar. 1987

MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS

SUBJECT: Sale of Surplus Water

The enclosed Army General Counsel opinions state that the Corps should refrain from using Section 501 of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 9701) to obtain reimbursement for water withdrawals. Army General Counsel also states that Section 6 of the Flood Control Act of 1944 provides sufficient authority and discretion to market water deemed surplus to existing project purposes. That discretion includes water currently being used for authorized purposes and includes any withdrawals for which we would have used 31 U.S.C. 9701 to obtain reimbursement. In view of that opinion, Section 6 of the Flood Control Act of 1944 should be used as the authority for obtaining reimbursement for water withdrawals.

I believe we must assure the states (particularly in the West) that use of Section 6 does not adversely affect the water rights prerogatives of the states. For that reason, it is desirable that we limit the use of this authority to situations that are consistent with these states rights. We should rely primarily on the authority of the Water Supply Act of 1958 to reallocate and sell storage in accordance with existing policies. Use of the Section 6 authority should be encouraged only where non-Federal interests do not want to buy storage because: (1) the use for the water is a short term one; or (2) the use is

temporary pending the development of the authorized use of the water and reallocation of storage is not appropriate. The views of the affected state(s) will be obtained, as appropriate, prior to consummating any sale using Section 6.

In accordance with Section 6, contracts for the use of surplus water will be at a reasonable price. A reasonable price is the market value. That annual value should be determined by the same procedure used to determine the annual payment for reallocated storage. However, the price should be limited to the annual cost of the least cost alternative but never less than the benefits foregone or, in the case of hydropower, revenues foregone.

For certain small withdrawals, using Section 6 authority, you may wish to establish a standard minimum charge or a standard unit charge which would be applied to a number of withdrawals from a project. Where such standard charges are proposed, they should be submitted to this office for approval. Section 6 contracts based on less than 50 acre-feet of storage need not be submitted to this office for approval.

The Counsel opinions also may provide increased flexibility for making water available for temporary use for municipal and industrial (M&I) purposes during periods of drought. It would be desirable to modify drought management plans to identify that flexibility and establish that the above procedure will be used to determine the price which we will charge for the use of water in our reservoirs during drought. In many instances, our projects provide an inexpensive insurance policy which allows local interests to defer construction of new water sources knowing that we will modify our project operations to the maximum amount possible to insure that M&I requirements are met. Often the operational changes cost the Government money. Our recent experience in the Southeast is a good example. There we reduced power output at Lake Lanier to meet Atlanta's requirements.

As a result, the Southeast Power Administration was required to spend additional funds to purchase power to meet contractual agreements. This in no way reflects negatively on the handling of the drought emergency in the Southeast. I believe it was well handled. I use it only as an example of the service which our projects provide for which the Federal Government should be reimbursed. Since it is extremely difficult to negotiate a price during a drought situation, the procedure/formula should be established beforehand. I would appreciate your views in this area.

/s/ Bob K. Dawson
ROBERT K. DAWSON
Assistant Secretary of the Army
(Civil Works)

Enclosures

APPENDIX G

ENVIRONMENTAL ASSESSMENT

for the

WATER INTAKE PERMITS, EASEMENTS, AND MUNICIPAL WATER SERVICE CONTRACT

related to the

ENERGY TRANSPORTATION SYSTEMS, INC. (ETSI) PIPELINE

and

SOUTH DAKOTA MUNICIPAL WATER SUPPLY

JUNE 1982

OMAHA DISTRICT

U.S. ARMY CORPS OF ENGINEERS

* * * *

NEED FOR AND OBJECTIVE OF ACTION

AUTHORITIES

The currently proposed Oahe water intake system falls under the requirements of Section 404 of the Clean Water Act and Section 10 of the River and Harbor Act of 1899. The Corps of Engineers has permitting authority under these laws.

Another potential Corps action to be covered by this assessment are easements or similar instruments for the water pipeline and related structures on Corps Land adjacent to Lake Oahe. The Corps would determine and

charge an appraised value for the land to be used and would provide a conditioned easement of a certain term.

Additionally, the Corps has responsibility, by virtue of the Independent Office Appropriation Act of 1952, to make a contract and levy a service charge for water made available to municipal users. Any water service contract would likely be negotiated with the State of South Dakota or with the communities and Rural Water Systems which would use the water.

* * * *

APPENDIX H

Reclamation Reform Act of 1982

Report of the Senate Committee on
Energy and Natural Resources

No. 97-373 April 29, 1982

[to accompany S.1867]

* * * *

[page 6]

PURPOSE

As reported, S. 1867 is the culmination of extensive effort on the part of both Houses of Congress and reflects previous Committee as well as floor activities seeking to reconcile 80 years of history and law to the current con-

[page 7]

siderations of farm practices and economics. As amended, S. 1867 provides a modern statement of Congressional policy on the program and related administrative efforts carried out pursuant to the Federal reclamation law.

[page 11]

A major purpose of S. 1867 is to provide a modern policy expression regarding Federal reclamation law in order to resolve the many controversies which would otherwise result from the implementation of regulations based upon current law.

[page 13]

Section 2(d).—The term "irrigation water" means water only made available for agricultural purposes from the operation of reclamation project facilities pursuant to a contract with the Secretary.

[pages 15-16]

Section 8(a).—This section clarifies the Congressional intent that the acreage limitation of reclamation law does not apply to projects constructed by the U.S. Army Corps of Engineers unless: (1) by explicit statutory language the Congress has designated the project as a reclamation project or has integrated it with or made it a part of a reclamation project; or (2) in addition to the project works constructed by the Corps, the Secretary of the Interior pursuant to the Federal reclamation law has also provided project works for control or conveyance of an agricultural water supply to the lands in question.

Section 8 of the Flood Control Act of 1944 provided that dams constructed by the Corps of Engineers thereafter "may be utilized for irrigation purposes", and the Act authorized the Secretary of the Interior to become involved in such projects "under the provisions of the Federal reclamation laws". The wording of the section is ambiguous and has given rise to sweeping controversies concerning the application of the reclamation law to agricultural lands which are benefited by dams constructed by the Corps. Subsequent court decisions and sporadic efforts on the part of successive Secretaries of the Interior to consummate contracts with various beneficiaries of Corps projects have served to create a shadow extending over all agricultural lands involved with Corps projects.

The Committee intends to make clear that section 8 of the Flood Control Act of 1944 did not, in and of itself, make the reclamation law applicable to any specific project. The specific legislation dealing with the project in question must be consulted to determine the applicability of the reclamation law.

It is the intention of the Committee that the Corps exemption does and shall apply to the projects on the Kings, Kern, Kaweah and Tule Rivers in California authorized by the Flood Control Act of 1944 (58 Stat. 887). It is also the intention of the Committee that this exemption does and shall apply to all Corps projects outside the 17 reclamation States. It is the general intent of this section to eliminate the shadow of applicability of the reclamation law to Corps of Engineers projects in any case in which the intent of Congress concerning such applicability is not clearly and explicitly set forth in statutory language.

Section 8(b).—The provision has been included in the bill to insure that the Secretary's authority to contract with water user entities for the irrigation water deliveries from Corps of Engineers projects, and to collect appropriate charges for those deliveries, continues in effect.

No. 86-939 and 86-941

Supreme Court, U.S.
FILED
JUL 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

ETSI PIPELINE PROJECT,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS STATES OF MISSOURI, IOWA AND NEBRASKA

STATE OF MISSOURI

WILLIAM L. WEBSTER
Attorney General

CURTIS F. THOMPSON*
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Tel. (314) 751-3321

STATE OF IOWA

THOMAS J. MILLER
Attorney General

ELIZABETH M. OSENBAUGH*
Deputy Attorney General

ELIZA OVROM
Assistant Attorney General
Hoover State Office Bldg.
Des Moines, IA 50319
Tel. (515) 281-5351

STATE OF NEBRASKA

ROBERT M. SPIRE
Attorney General

LE ROY W. SIEVERS*
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
Tel. (402) 471-2682

* Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Secretary of the Interior may market water from multipurpose storage in Army reservoirs on the Missouri River without regard to the express provisions of section 6 of the Flood Control Act of 1944, which confer that authority on the Secretary of the Army and which protect existing uses of that water.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATUTES INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. THE SECRETARY OF THE INTERIOR'S ASSERTION OF INDUSTRIAL MARKETING AUTHORITY AT ARMY RESERVOIRS IS IMPROPER BECAUSE IT IS INCONSISTENT WITH THE LANGUAGE, PURPOSE, AND HISTORY OF THE FLOOD CONTROL ACT.	18
A. Congress Deliberately Conferred Industrial Marketing Authority on Army, Not Interior, in Section 6 of the Act.	18
B. This Assertion of Authority is Contrary to the Language, Purpose, and History of Section 8 Because it Expands Interior's Scope of Authority in a Manner Congress Expressly Refused to Enact.	22
C. Section 9(c) of the Act Simply Applies Reclamation Law to Reclamation Developments to Be Undertaken by the Secretary of the Interior under the General Comprehensive Plans for the Missouri River.	29
D. Congress has the Authority to Modify the Act, and the Secretary of the Interior Should not be Permitted to Arrogate that Power.	33

TABLE OF CONTENTS—Continued

Page

II. CONGRESS DID NOT GIVE THE SECRETARY OF THE INTERIOR AUTHORITY TO OVERRIDE THE TERMS OF SECTION 6 AND EXPAND THE SCOPE OF HIS AUTHORITY AT ARMY RESERVOIRS. 40

III. *AMICI'S* ARGUMENT IS IRRELEVANT TO THE ISSUE IN THIS CASE. 45

CONCLUSION 50

ADDENDUM 1a

Flood Control Act of 1944, ch. 665, 58 Stat. 887, 887-898 ..... 1a

Memorandum from Susan J. Crawford, General Counsel, Dep't of the Army, to the Assistant Secretary of the Army (Civil Works), Proposed Contracts for Municipal and Industrial Water Withdrawals from Mainstem Reservoirs (Mar. 13, 1986) 12a

Upper Missouri Region, Bureau of Reclamation Summary of Statements, Letters, and Resolutions Received from Public on Proposed Water Service Contract Between ETSI and the United States (A.R. 900, 287) (Excerpts) 20a

Map, "Pick-Sloan Missouri Basin Program Completed Dam & Reservoir Projects," Army Corps of Engineers, October 1982 ..... 23a

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546 (1963) 46

Board of Governors of the Federal Reserve System v. Dimension Financial Corporation, 474 U.S. —, 106 S.Ct. 681 (1986) 37, 40, 41, 46

Board of License Commissioners of Town of Tiverton v. Pastore, 469 U.S. 238 (1985) 36

Botany Worsted Mills v. United States, 278 U.S. 282 (1929) 22

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 40, 41

Environmental Defense Fund, Inc. v. Andrus, 596 F.2d 848 (9th Cir. 1979) 22

Environmental Defense Fund v. Morton, 420 F. Supp. 1037 (D. Mont. 1976) 22

Fusari v. Steinberg, 419 U.S. 379 (1975) 36

Gulf Oil Corp. v. Copp Paving Company, Inc., 419 U.S. 186 (1974) 27

Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. —, 107 S.Ct. 1207 (1987) 27, 33, 41

Intake Water Company v. Yellowstone River Compact, 769 F.2d 568 (9th Cir. 1985), *cert. denied* 105 S.Ct. 316 (1986) 47

Investment Company Institute v. Camp, 401 U.S. 617 (1971) 30

Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. —, 106 S.Ct. 1890 (1986) 34, 40, 41

TABLE OF AUTHORITIES—Continued

Page

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 41

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 27

N.L.R.B. v. Brown, 380 U.S. 278 (1965) 42

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1940) 48

Park'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. —, 105 S.Ct. 658 (1985) 33

Securities and Exchange Commission v. Sloan, 436 U.S. 103 (1978) 43

Securities Industry Assn. v. Board of Governors of the Federal Reserve System, 468 U.S. 137 (1984) 30

State of South Dakota v. Nebraska (No. 103 Orig.) 14, 46

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 43

Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263 (1960) 41

United Parcel Service v. Mitchell, 451 U.S. 56 (1981) 45

United States ex rel. Chapman v. Federal Power Commission, 345 U.S. 153 (1953) 25

United States v. Chandler-Dunbar Water Power Company, 229 U.S. 53 (1913) 37

United States v. James, 478 U.S. —, 106 S.Ct. 3116 (1986) 33

TABLE OF AUTHORITIES—Continued

Page

United States v. Riverside Bayview Homes, Inc., 474 U.S. —, 106 S.Ct. 455 (1985) 44

United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. 1976) 23, 28

STATUTES AND REGULATIONS

Act of May 9, 1938, § 1, 52 Stat. 322, 43 U.S.C. § 392(a) 35

Act of July 3, 1958, Pub. L. No. 85-500, 72 Stat. 297 35

Act of August 14, 1964, Pub. L. No. 88-442, 78 Stat. 446 ..... 23, 39

Act of September 30, 1982, Pub. L. No. 97-273, 96 Stat. 1181 ..... 7, 23, 35

Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* 13

Department of Energy Organization Act, § 302(a), 42 U.S.C. § 7152(a) 7, 39

Flood Control Act of 1944, ch. 665, 58 Stat. 887

§ 1, 58 Stat. 888 ..... 2, 48

§ 1(a), 58 Stat. 888 ..... 2, 46

§ 1(b), 58 Stat. 889 ..... 2, 45, 46, 47, 48

§ 1(c), 58 Stat. 889 ..... 2, 46

§ 5, 58 Stat. 890 2

§ 6, 58 Stat. 890 ..... 2, 3, 15-22, 25-27, 33-40, 42

§ 7, 58 Stat. 890 ..... 2, 25

§ 8, 58 Stat. 891 ..... 16, 19, 22-29, 33, 34, 39, 40, 42

§ 9, 58 Stat. 891 ..... 2, 7, 28, 33, 34, 35

TABLE OF AUTHORITIES—Continued

Page

§ 9(a), 58 Stat. 891 ..... 2, 5, 29, 32

§ 9(b), 58 Stat. 891 ..... 2, 32

§ 9(c), 58 Stat. 891 ..... 3, 12, 16, 22, 29-32, 35

§ 9(d), 58 Stat. 891 2

§ 9(e), 58 Stat. 891 2

§ 10, 58 Stat. 891 ..... 25, 28, 29, 34

Montana Code Annotated §§ 85-2-311(3) and 85-2-402(5) 47

National Environmental Policy Act, 42 U.S.C. § 701 *et seq.* 13

Reclamation Act of 1902, ch. 1093, § 1, 32 Stat. 388 (43 U.S.C. § 391) 31

Reclamation Project Act of 1939, § 9(c), 43 U.S.C. § 485h(c) 10, 12, 21, 29, 45

Reclamation Project Act of 1939, § 10, 43 U.S.C. § 387 31

Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, 96 Stat. 1263-1274 ..... 23, 28, 39, 43

§ 212(a), 96 Stat. 1269 (43 U.S.C. § 390*ll*(a)) 23

§ 212(b), 96 Stat. 1269 (43 U.S.C. § 390*ll*(b)) 43

South Dakota Compiled Laws, § 46-A-1-78 23

43 U.S.C. § 392a 35

Water Supply Act of 1958, 43 U.S.C. § 390b 12, 39

Wyoming Statute § 41-3-115 (1987) 47

Yellowstone River Compact, Art. X, 65 Stat. 663 47

U.S. Army Corps. of Engineers Regulation, 33 C.F.R. § 208.11 27

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS

90 Cong. Rec. (1944):

p. 4134 20
p. 4139 48
p. 4197 ..... 20, 48
p. 4216 48
p. 8231 19
p. 8245 5
p. 8314 24
p. 8315 32
p. 8374 47
p. 8548 ..... 32, 33, 44, 45
pp. 8552-8553 29
p. 8622 24
p. 8625 ..... 5, 27
p. 9259 27
p. 9260 26
p. 9279 38
p. 9281 4
p. 9282 ..... 5, 34
p. 9284 4

128 Cong. Rec. (1982):

pp. 16605-16606 24

TABLE OF AUTHORITIES—Continued

Pages

p. 16607 ..... 7, 24, 43

pp. 16607-16608 28

p. 16611 43

p. 16613 24

Flood Control: Hearings on H.R. 4485 Before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. (1944) 19, 20, 23, 26, 31, 32, 38, 47, 48

Guhin, *The Law of the Missouri*, 30 S.D. L. Rev. 347 (1985) 28, 45

H.R. 4347, 97th Cong., 1st Sess. (1981) 23

H.R. Doc. 475, 78th Cong., 2d Sess. (1944) 4, 5, 24, 25

H.R. Rep. 2051, 78th Cong., 2d Sess. (1944) 26

Memorandum from Susan J. Crawford, General Counsel, Department of the Army, to the Assistant Secretary of the Army (Civil Works), *Proposed Contracts for Municipal and Industrial Water Withdrawals from Mainstem Reservoirs* (Mar. 13, 1986) 36

Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works, 85th Cong., 1st Sess. (1957) 34, 35

Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. (1975) 8, 10, 29, 43

41 Op. Att'y Gen. 377 (1958) 23, 25, 28, 29, 34

TABLE OF AUTHORITIES—Continued

Pages

Reclamation Reform Act of 1981: Hearings on S. 1867 Before the Senate Comm. on Energy and Natural Resources, 97th Cong., 1st and 2d Sess. (1981) 28

S. 1374, 97th Cong., 1st Sess. (1981) 23

S. 1553, 97th Cong., 1st Sess. (1981) 23

S. Doc. 191, 78th Cong., 2d Sess. (1944) 4, 5, 6, 24, 30

S. Doc. 247, 78th Cong., 2d Sess. (1944) 4, 5, 6

S. Rep. 373, 97th Cong., 2d Sess. (1982) 24

S. Rep. 1066, 84th Cong., 1st Sess. (1955) 43

No. 86-939 and 86-941

In The
Supreme Court of the United States
October Term, 1986

ETSI PIPELINE PROJECT,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS STATES OF MISSOURI, IOWA AND NEBRASKA

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Pet. App. 1a-44a)[1] affirming the District Court is re-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in this case by ETSI Pipeline Project (No. 86-939); "J.A." is the Joint Appendix filed by the parties; "State App." are documents attached to this brief; "A.R." refers to administrative record documents on file with the Clerk of the District Court in Lincoln, Nebraska; "C.A. App." is the Court of Appeals appendix; "ETSI App." is the appendix to ETSI's brief on the merits.

ported at 787 F.2d 270. The District Court opinion (Pet. App. 45a-72a) is reported at 586 F.Supp. 1268.

STATUTES INVOLVED

Sections 1 through 9 and the introduction of section 10 of the Flood Control Act of 1944, ch. 665, 58 Stat. 887, are set out in the Addendum to this brief.

STATEMENT

This case arises because the Department of Interior's Bureau of Reclamation in 1982 granted a water service contract to ETSI to withdraw annually 20,000 acre-feet of Missouri River water from Lake Oahe, an Army Corps of Engineers reservoir on the Missouri River located in South and North Dakota, to use as a transportation medium in a coal slurry pipeline. J.A. 224.

In approving the ETSI contract, Interior justified it as part of a previously unannounced industrial water marketing program from the six Army reservoirs on the Missouri River. (This program, it said, was "currently limited to" one million acre-feet of water annually). J.A. 219. The Department of the Army operates these reservoirs under the Flood Control Act of 1944. Interior claimed this power under the Act despite the fact that section 6 of that Act authorizes the Secretary of the Army, not Interior, to execute contracts for industrial use of surplus water at any reservoir under the control of the Secretary of the Army.

The States of Missouri, Iowa and Nebraska, and their citizens use Missouri River water for drinking water, irrigation, recreation, navigation, hydroelectric power production, water supply, and waste disposal. *See* Second Amended Complaint, ¶s 8-10. Missouri River levels are also critical to maintenance of adjacent fish and wildlife habitat and ground water levels. *Id.*

Concerned that the Department of the Interior's actions would result in substantial diversion of Missouri River waters to large industrial users without regard to federal laws governing industrial use of those waters and without adequate environmental analysis, the States filed suit in August, 1982.

On May 3, 1984, the United States District Court for Nebraska, the Honorable Warren J. Urbom, Chief Judge, enjoined performance of the ETSI water service contract on the ground that the Secretary of the Interior lacked authority to permit industrial use of Army reservoir water. The District Court concluded that this authority was conferred on the Secretary of the Army under section 6 of the Flood Control Act. The Secretary of the Interior could not rely on reclamation law to assert contrary authority under section 9(c) of the Act as Lake Oahe was not a "reclamation project to be undertaken by the Secretary of the Interior" under the Act. Pet. App. 45a-70a.

The Court of Appeals for the Eighth Circuit affirmed. The Court held that the clear meaning of the Act as well as its legislative history established that Congress deliberately conferred this authority on the Secretary of the Army rather than on the Secretary of the Interior. The Court rejected the argument that Interior should have

plenary power to convert "irrigation storage" to industrial use. Pet. App. 1a, 17a-35a.

History of Lake Oahe

Congress divided the proposed Missouri River Basin projects in the "Pick-Sloan Plan"[2] between Army and Interior according to the dominant purpose of the projects. Pet. App. 50a. Projects whose dominant purpose was flood control would be built and operated by the Corps. Projects whose dominant purpose was irrigation would be built and operated by the Bureau.[3] Congress gave separate authority and appropriations to each agency to begin construction of projects assigned to it.[4] Congress unequiv-

---

[2]The "Pick-Sloan Plan" actually consists of three documents, the Pick or Army Plan contained in H.R. Doc. 475, 78th Cong., 2d Sess.; the Sloan or Interior Plan in S. Doc. 191, 78th Cong., 2d Sess.; and S. Doc. 247, 78th Cong., 2d Sess.

[3]Representative Whittington, the principal manager of the bill in the House, commented that "[t]he conference agreement contains the reconciliation of the views as between these two agencies of the Government and provides for the construction of the works that are predominantly flood control by the Chief of Engineers and for the construction of the works that are predominantly reclamation by the Bureau of Reclamation." 90 Cong. Rec. 9281 (1944).

[4]As Representative Curtis commented:

> There is a definite need for both the Army engineers and their program of flood control and the work of the Bureau of Reclamation and their program of irrigation. This legislation authorizes both programs and gives to each agency a $200,000,000 authorization.

90 Cong. Rec. 9284 (1944).

ocally endorsed this division of mission in its debates,[5] and the Act clearly adopts it.

Both agencies agreed that the Missouri River main stem reservoirs, including Oahe, should be constructed, operated, and maintained by the Corps of Engineers "because of their peculiarly close relationship with flood control and navigation below Sioux City . . ." H.R. Doc. 475, p. 6 (Comments of the Bureau of Reclamation). *See also* S. Doc. 191, pp. 4, 7; S. Doc. 247, p. 3. H.R. Doc. 475, pp. 3-4 (1944). Pet. App. 57a, 59a. Interior sought to build and construct more reservoirs on the tributaries.[6]

---

[5]*E.g.*, Remarks of Senator Overton, Senate manager of the Flood Control Act, 90 Cong. Rec. 8245 (1944) ("I believe that flood control should be under the Board of Army Engineers for Rivers and Harbors. I believe that irrigation projects and other related projects should be under the control of the Bureau of Reclamation . . . ."); Remarks of Senator Overton, 90 Cong. Rec. 8625 ("I endorse the statement made by the President of the United States. He undertakes to show a line of demarcation between reservoirs for reclamation and irrigation purposes and those built for flood control and navigation. One category is to be built by the Bureau of Reclamation, and the other by the Army Engineers."); Remarks of Rep. Whittington, 90 Cong. Rec. 9282, primary House manager of the Flood Control Act ("Section 9(a), authorizing the Missouri River Basin improvement, provides . . . that the works that are predominantly flood control shall be constructed by the Chief of Engineers, and the works that are predominantly reclamation shall be constructed by the Bureau of Reclamation.").

[6]The Sloan Plan states:

> The major part of the run-off originates in the mountain headwaters, and storage capacities in such localities are just as effective as capacity in the main stream in the Dakotas. For irrigation, for maximum power production, and for distributed flood control, many reservoirs are, therefore, provided in the headwaters area. There need be retained in the Dakota section only the

(Continued on following page)

Although Interior's plan provided for a larger reservoir at Oahe, Interior actually proposed ten million acre-feet less capacity in the main stem reservoirs than Army did and made irrigation a primary purpose of Fort Peck, a reservoir previously constructed for navigation purposes.[7] S. Doc. 191, p. 121. A primary purpose of Lake Oahe was to provide adequate waters for navigation downstream to compensate for the water to be diverted from Fort Peck. *Id.* The documents reconciling the two agencies' engineering reports approved Interior's proposals for extensive reclamation reservoirs on the tributaries but also provided the expansive capacity the Corps wanted on the main stem.[8] S. Doc. 247.

The Army Corps of Engineers concededly built Oahe and has always operated and maintained that reservoir. Interior has always recognized Army's control over Oahe. Pet. App. 55a. The ETSI contract itself states that "The

---

(Continued from previous page)

> necessary capacity to control and regulate the residual flows that are not controlled upstream.

S. Doc. 191 at 122. The Sloan Plan thus provided for reclamation reservoirs and irrigation units providing over thirteen million acre-feet of additional storage in the Yellowstone Basin, on the Missouri River tributaries above Sioux City, and in the Niobrara, Platte, and Kansas River Basins. S. Doc. 191, p. 94-95, 120-121.

[7]The 1944 Flood Control Act was not, as *amici* assert, p. 11, Congress' first consideration of Corps projects in the west. Congress had already authorized the Fort Peck Reservoir and a six-foot navigational channel as part of its comprehensive plan for the Missouri River for navigation and flood control purposes in the Flood Control Act of 1938, P.L. 761, 75th Cong.

[8]The Corps has built and is operating 20 Pick-Sloan Missouri Basin program reservoir projects, and the Bureau has built and is operating 33 such projects. States' App. 23a.

United States, through its Corps of Engineers, has constructed and is operating the Oahe Dam and Reservoir . . . pursuant to Section 9 of the Flood Control Act of December 22, 1944." J.A. 225.

Interior currently exercises no functions at Oahe reservoir. Although Interior's Bureau of Reclamation once marketed power generated at the Army power plants, that authority was transferred to the Department of Energy in 1977. 42 U.S.C. § 7152(a)(1)(E). The Bureau's primary function is irrigation, yet it has executed no irrigation contracts at Oahe[9] and the only Congressionally-authorized irrigation work at Oahe has been effectively deauthorized.[10] Pet. App. 20a. Significantly, there is no specific storage space assigned to irrigation at Oahe. Instead, all water is in multiple-use storage, where it is used for all authorized project purposes, including irrigation, power generation, and navigation. Pet. App. 20a, 63a.

The Memorandum of Understanding

In late 1973, during the "energy crisis," the Army and Interior Departments hastily set up an "Ad Hoc Committee on Water Marketing from the Mainstem Reservoirs" to consider use of reservoir water for possible synthetic fuel projects. The agencies initially agreed that the Secretary of the Army would be the lead agency, but

---

[9]128 Cong. Rec. 16607, Table I-Status, n.3. Some riparian irrigators and other irrigators within South Dakota draw water from Lake Oahe pursuant to South Dakota water permits but not contracts with the Bureau of Reclamation.

[10]Pub. L. 97-273, 96 Stat. 1181 (1982).

"subsequent divergence of views" left the choice of marketing agency unresolved. A.R. 900,055; C.A. App. 161.[11]

In December 1974 the Army Acting General Counsel concluded that joint marketing through a temporary memorandum of understanding would be acceptable. J.A. 129. But the Acting General Counsel added that "notwithstanding my opinion that there is *arguable* authority for the Secretaries of the Army and Interior, *acting jointly*, to market water from the main stem reservoirs for this purpose, I *strongly advise that legislation* establishing a systematic marketing system *be sought.*" He further stated without qualification that "*the Secretary of the Interior may not market the water* from these [main-

---

[11]The Chairman of the Missouri River Basin Commission (MRBC) was chairman of the Ad Hoc Committee, but it was not an MRBC undertaking. The state subcommittee concluded that definitive decisions on many of the issues presented by the proposed water marketing could not be made on the information available and in such a short time period. Summary of the Missouri River Basin Water Marketing Question, submitted by the Honorable Thomas L. Judge, Governor of Montana, Missouri River Basin Industrial Water Marketing, Hearing before the Subcommittee on Energy Research and Water Resources of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. 47 (1975) [hereinafter 1975 Hearings]. The states subcommittee position paper sought referral of the water marketing questions to the MRBC. *Id.* Several of the Basin States questioned the authority of the federal agencies to convert major quantities of water for industrial use. *Id.* The Governor of the State of South Dakota complained in 1975 that the ad hoc committee did not adequately consider the wishes of the States. 1975 Hearings at 13.

Interior cites the Ad Hoc Committee report as an example of its "careful study" prior to execution of the MOU. (Fed. Br., p. 16). Between December 19, 1973, and January 3, 1974, a committee of federal employees prepared the report on Missouri River water availability for energy use. A.R. 900,336; Memoran-

(Continued on following page)

stem] reservoirs *independently.*'' J.A. 135n*.[12] (emphasis added).

The Interior Solicitor meanwhile concluded that his agency did have authority to market the water for industrial use. J.A. 120. His unpublished memorandum, which was sharply criticized by both courts below, was the sole basis for the Department's assertion of this authority. Pet. App. 69a.

On February 24, 1975, the Army and Interior Secretaries signed a memorandum of understanding (MOU) providing for a limited two-year joint marketing plan. The Secretary of the Army specifically advised the Secretary of the Interior of his concern that statutory authority for the water marketing was unclear; he described the MOU as a temporary solution pending Congressional action. J.A. 142.

The MOU provided that Interior would execute the contracts on its own behalf and ''as agent for Army.'' J.A. 136. The MOU required Army approval of all contract terms and provided that Army was to ''retain all operational and managerial control'' over the reservoirs. *Id.* The Secretary of the Army (and later also, the Sec-

---

(Continued from previous page)

dum to Technical Group Leaders and Members from John Neuberger, Dec. 19, 1973. The Department of the Interior made a subsequent determination of water availability for the Memorandum of Understanding. That determination is also challenged by the plaintiffs. Second Amended Complaint, ¶ 64.

[12]The Army Acting General Counsel also stated that he concurred with the General Counsel for the Chief of Engineers that the main stem reservoir water was not surplus water available for conversion to industrial use because practically all of the water was being used for generation of hydropower, an authorized project purpose. J.A. 133-35.

(Continued on following page)

retary of Energy) had to agree that the proposed energy use was a beneficial use taking precedence over hydropower generation. *Id.* Army, not Interior, continued to contract for municipal use of those reservoirs.[13] A.R. 930,315, C.A. App. 357.

The temporary MOU was sharply criticized during Senate subcommittee hearings.[14] Several Missouri River Basin States criticized the MOU.[15] The agencies testified that the MOU was an interim measure. 1975 Hearings at 23, 30-31. Two water service contracts with industrial users were executed pursuant to the MOU.[16] J.A. 145-146.

(Continued from previous page)

However, the Army General Counsel has now opined that the Secretary of the Army may make a reasoned accommodation between hydropower generation and industrial use and may permit industrial use of the main stem reservoirs despite loss of hydropower. States' App. 12a, cited in Fed. Br. p. 39, n.58. See pp. 36-37, *infra*.

[13]Proposed municipal water use which would share the ETSI aqueduct was to be by contract with Army, not Interior. Corps of Engineers Environmental Assessment, C.A. App. 361.

The Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c), authorizes contracts "to furnish water for municipal water supply or miscellaneous purposes at reclamation projects." Yet Interior did not assert authority over these municipal uses at Oahe.

[14]*See, e.g.*, 1975 Hearings, Part I, pp. 1-2, 42, 50-51; Part II, pp. 298-304.

[15]*See, e.g.*, comments of Nebraska, 1975 Hearings, Part II, p. 302; and of South Dakota, 1975 Hearings, Part I, pp. 13-14.

[16]The ANG contract, although actually executed after termination of the MOU, recites the MOU as authority. J.A. 146. It was therefore presumably executed with Army approval.

A "master contract" with the Montana Department of Natural Resources was also executed in 1976. Br. for Montana as *Amicus Curiae* in support of Petitions for Writ of Certiorari,

(Continued on following page)

Citing its continuing reservations regarding statutory authority, Army refused to further extend the MOU, J.A. 143-44, and the agreement expired on December 31, 1978.

The ETSI Contract

The execution of the ETSI contract in July 1982 was Interior's first assertion of unilateral authority to market main stem reservoir water for industrial use. Pet. App. 11a. That contract permits ETSI to withdraw Oahe Reservoir water for use as a medium to transport coal in a coal slurry pipeline.[17] The contract permits the withdrawal of 20,000 acre-feet[18] per year for forty years and provides a right of renewal.[19] ETSI planned to pump the water 276 miles to Wyoming for injection into the coal slurry pipeline. Pet. App. 7a. The water would then be discharged in Louisiana and Arkansas, the proposed termini of the pipeline; it would not be returned to the Basin.

Interior justified the ETSI water service contract as part of its previously unannounced water marketing pro-

---

(Continued from previous page)

p. 2. No diversions were made under the contract and it expired in 1986. *Id.*

[17]J.A. 225-226, ¶ b. The complaint alleges that a transportation use is not a permitted use under the Flood Control Act, an issue not reached below.

[18]Twenty thousand acre-feet of water is the equivalent of 6.5 billion gallons. This amount of water withdrawn from Oahe "would cause average losses of about 2 mw (megawatts) and 18 million kwh (kilowatt hours) per year." Corps of Engineers Environmental Assessment, A.R. 930,315, C.A. App. 363. The diversion of one million acre-feet of water would reduce hydropower generation on the main stem by five percent. 1975 Hearings at 34.

[19]ETSI also intends to request an additional 30,000 acre-feet. The contract recognizes that ETSI "intends to request an additional water service contract from the United States as plans are developed to utilize the full 50,000 acre-feet of water per year." J.A. 226, ¶ c.

gram.[20] J.A. 212-23. Interior merely cited the Solicitor's 1974 opinion to assert this authority under section 9 (c) of the Flood Control Act and section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (53 Stat. 1187). J.A. 216-17; Pet. App. 69a.

Army did not approve the ETSI water service contract.[21] Pet. App. 15a-17a. See pp. 20-21, *infra*.

In August 1982 the States filed this suit challenging the validity of the water service contract and marketing program under the 1944 Flood Control Act, the 1958 Water

---

[20]A 1980 internal departmental memorandum stated that Interior intended to continue water marketing from the main stem reservoirs despite expiration of the MOU. J.A. 148. That memo cited the 1974 Solicitor's opinion as its sole legal authority. The agency could not obtain sufficient internal agreement on major issues to submit a Secretarial Issue Document for Secretarial approval. J.A. 147.

The document approving the ETSI contract states that the MOU procedures were being followed, citing this memo. J.A. 216-217. There is, however, no finding that the Interior, Army, and Energy Departments concluded that the ETSI use was a beneficial use taking precedence over hydropower generation. *See* J.A. 212. Army did not approve the ETSI contract. Pet. App. 15a-17a. The 1980 memorandum also concludes that a state could not receive more than its costs for permitting use of a federal reservoir, J.A. 150, but the agreement between South Dakota, the South Dakota Conservancy District, and ETSI provided for substantial payments by ETSI for its state permit. J.A. 163-168.

[21]The Missouri River Division of the Army Corps of Engineers granted ETSI permits for construction of the intake structure but specifically refused to consider any arguments concerning authority for Interior's grant of a water service contract. *See* p. 21 *infra*. Pet. App. 16a, n.8.

The plaintiff States have also challenged the actions of the Army Corps of Engineers in granting these construction permits without regard to the validity of the water service contract.

Supply Act, 43 U.S.C. § 390b, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* The States also contended that the agency violated the National Environmental Policy Act, 42 U.S.C. § 701 *et seq.*

Suit was also filed by the Kansas City Southern Railroad, the Sierra Club, and three chapters of the Farmers Educational and Cooperative Union of America. J.A. 42. These actions were consolidated for trial. J.A. 7, Docket No. 72.

The District Court Decision

The District Court, ruling on cross-motions for partial summary judgment, held that the ETSI contract was *ultra vires.* Because the District Court concluded that reclamation law did not apply to industrial marketing at Oahe, it did not reach other issues including, *inter alia,* whether the Secretary of the Interior could authorize the export of water out of the Missouri River Basin, execute a contract for transportation use, or implement a massive industrial water marketing program for industrial use without Congressional approval.

Cancellation of the Pipeline Project

In July 1984, ETSI announced its termination of the pipeline project and cancelled its state water permit. Mootness Exh. 1; Mootness Exh. 10, J.A. 257. Suggestions of mootness were referred to the District Court Fed. Pet. Reply Br., p. 3a. The Court of Appeals affirmed the District Court's conclusion that the appeals were not moot because ETSI and Interior had not taken action to ter-

minate their contract and because the ETSI contract was part of a water marketing program.[22] Order of April 22, 1985, by Gibson, J., and Bright, J., with Fagg, J., dissenting. Fed. Pet. Reply Br. at 1a.

Four days before oral argument in the Court of Appeals, the State of South Dakota filed a motion for leave to file an original action in this Court. *State of South Dakota v. Nebraska* (No. 103 Original). The essence of that motion was that this suit is in reality a suit between the States. This argument had been considered and rejected by the Court of Appeals. Pet. App. 15a, n.7. This Court granted North Dakota's motion to intervene but denied without prejudice the motion for leave to file complaint. However, in September 1986, the State of South Dakota renewed its motion for leave to file. That motion remains pending.

Subsequent Army Interpretation

On the same day that the Court of Appeals affirmed the District Court decision, the Army General Counsel issued an opinion broadening the definition of "surplus water" available for marketing by Army under section 6 of the Act. Fed. Br., p. 38, n.58. States' App. 12a.

---

[22]The federal defendants and ETSI had in the District Court consistently denied plaintiffs' allegations concerning the existence of the water marketing program. The federal defendants, for example, refused to submit an administrative record for the program, see J.A. 14, Docket No. 152. Shortly before the District Court ruling on summary judgment, ETSI filed a motion in limine on behalf of the defendants seeking exclusion of all evidence concerning impacts of water withdrawals other than ETSI's. J.A. 31, Docket No. 355.

Petitions for Certiorari

This case is now before this Court on petitions for certiorari filed by the federal defendants and by ETSI.

SUMMARY OF ARGUMENT

1. The 1944 Flood Control Act carefully allocates the respective jurisdictions of the Secretary of the Army and the Secretary of the Interior over the projects authorized in the Act. Contrary to defendants' arguments, the Secretary of the Interior's authority at Army reservoirs is not plenary. Rather, the Act defines his authority and also specifies the terms under which industrial use of Army reservoirs may be permitted. Only Congress can modify those provisions.

Section 6 of the Flood Control Act directly addresses industrial marketing authority at any reservoir under the control of the Secretary of the Army. The Secretary of the Interior concedes that Lake Oahe is a reservoir under the control of the Secretary of the Army. Therefore, section 6 authorizes the Secretary of the Army, and not the Secretary of the Interior, to contract for domestic and industrial uses for surplus water at Lake Oahe. The Department of the Interior, nevertheless, unilaterally executed the ETSI contract without approval by the Secretary of the Army.

Interior's execution of the ETSI contract is also inconsistent with Congress' expressed intent to protect existing uses of the water. Section 6 requires that indus-

trial water service contracts shall not adversely affect existing uses of the water. The Secretary of the Interior, by contrast, considers only the impact of the withdrawal on the "irrigation efficiency" of the reservoir under reclamation law.

Congress directly addressed the question by whom and under what conditions this water could be marketed. It is particularly inappropriate to imply any exception to the commands of section 6 because Congress considered, and rejected, proposals which would grant Interior the authority it now asserts. Congress rejected two proposed amendments to section 6 to permit Interior to market water for industrial use at Army reservoirs in certain instances.

Nonetheless the Department of the Interior asserted that it could market Oahe water for industrial use. Its purported basis was section 9(c) of the Flood Control Act, which applies reclamation law only to "reclamation and power developments to be undertaken by the Secretary of the Interior under [the general comprehensive plans for the Basin]." Defendants make no attempt to establish error in the lower courts' holdings that Oahe is not a reclamation development to be undertaken by the Secretary of the Interior under those plans. Instead defendants argue that the agencies and some legislators suggested that Interior regulations should control "irrigation storage" at Army reservoirs. However, Congress enacted section 8 in lieu of the House version which embodied those suggestions. Section 8 provides a procedure for Interior to construct and operate irrigation works and clearly does not authorize the ETSI contract.

2. The defendants frame the issue as whether the Secretary of the Interior may supply "unutilized irrigation water" for industrial use. There is, however, no defined irrigation storage at Oahe. Instead, waters are stored in multiple-use storage where they serve all authorized project purposes, including navigation and hydropower generation as well as irrigation. To call the water "unutilized" is clearly incorrect. Indeed, ETSI and the *amici* contend that section 6 will bar all industrial use on the ground that there is no surplus water because all of the water is now utilized. The Army General Counsel has, however, recently opined that main stem reservoir water may be made available for industrial use under section 6.

3. The Department of the Interior cannot assume jurisdiction in contravention of section 6 without Congressional authorization. The agency's own preference for industrial use or for financial credit cannot override the judgment of Congress. This assumption of legislative power is especially inappropr' te here because Congress has repeatedly emphasized the need for Congressional authorization to modify the operation of these reservoirs. The agency has had an adequate opportunity to seek that authorization. Congress is the sole constitutional authority able to "correct" statutes. As a representative body which can re-write statutes to suit its purposes, Congress is best able to frame a remedy. This Court should not ratify Interior's attempt to evade the authority of Congress.

4. Deference would be inappropriate at any rate because Army, not Interior, administers the relevant act. Interior made no attempt to articulate a reasonable basis for its authority to execute the ETSI contract. The sole basis for its position was a 1974 memorandum from its Solicitor which ignored the text of the Act and was directly contrary to the opinion of Army's Acting General Counsel. The decisions below by contrast carefully consider the text, the purpose, and the history of the Act. Those decisions are clearly correct and should be affirmed.

ARGUMENT

I. THE SECRETARY OF THE INTERIOR'S ASSERTION OF INDUSTRIAL MARKETING AUTHORITY AT ARMY RESERVOIRS IS IMPROPER BECAUSE IT IS INCONSISTENT WITH THE LANGUAGE, PURPOSE, AND HISTORY OF THE FLOOD CONTROL ACT.

A. Congress Deliberately Conferred Industrial Marketing Authority on Army, Not Interior, in Section 6 of the Act.

Congress directly addressed the question of authority for industrial water marketing at Army reservoirs constructed under the 1944 Flood Control Act. Section 6, codified at 33 U.S.C. § 708, states:

> That *the Secretary of War is authorized to make contracts* with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, *for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be de-

> posited in the Treasury of the United States as miscellaneous receipts.

(emphasis added).

Section 6 clearly provides for Army control of industrial uses at Army reservoirs. As Senator Overton, the manager of the Flood Control Act in the Senate, explained:

> [I]n connection with the sale for domestic and *industrial uses* of surplus water available in any reservoir under the control of the War Department, the committee has recommended an amendment which protects the existing lawful uses of the water. For instance, when a dam is constructed and water is impounded in it and there is nearby a lawful user of that water, we do not want to deprive him of his rights. Therefore, he is permitted to take water from the dam, but, *of course, he does it under the direction of the Secretary of War.*

90 Cong. Rec. 8231 (1944) (emphasis added).

Congress rejected a proposal by Secretary of the Interior Ickes to amend section 6 to grant Interior authority over industrial water marketing at Army reservoirs utilized for irrigation purposes under section 8.[23] Secretary

---

[23]His proposal would have amended section 6 (then section 4) as follows:

> Provided, that the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pursuant to section 6 [enacted as section 8] of this Act.

Flood Control: Hearings on H.R. 4485 Before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., at 312-13 (1944) [hereinafter H.R. 4485 Senate Hearings].

Ickes recognized that section 6 "does not involve reclamation but covers merely the sale of water for industrial purposes . . ." H.R. 4485 Senate Hearings, pp. 312-313. Ickes argued, however, that the amendment would promote "efficient and economical administration." *Id.* Congress did not enact the proposed amendment.

Congress rejected another amendment which would apply reclamation law to industrial use of all reservoirs west of the 97th meridian.[24] 90 Cong. Rec. 4197. The House manager of the bill, Representative Whittington, opposed the amendment, saying that "the purpose of Section 4 [Section 6 of the Act] *in no way involves reclamation.*"[25] *Id.* On a vote of the House, the amendment was rejected.

Interior cannot claim it executed the ETSI contract pursuant to any delegation of authority from Army. The 1975 MOU was terminated long before the ETSI contract was executed, J.A. 217, and the Court of Appeals specifically found that Army did not participate or join in the

---

[24]That amendment stated:

> *Provided, however,* That, in the case of any reservoir located west of the 97th meridian the right to the use of waters for such purposes shall be established, and the repayment of costs allocated thereto shall be provided for, pursuant to the provisions of the Federal Reclamation laws.

90 Cong. Rec. 4197 (1944).

[25]Representative Whittington also said that section 6, numbered section 4 in the House, was needed so that "the Government" could provide water from Army reservoirs for domestic and industrial use, 90 Cong. Rec. 4197, thus implying that Interior did not have this authority. Pet. App. 66a. Representative Whittington also stated that this would provide similar authority to the Corps in reservoir districts that Interior already had in reclamation districts. 90 Cong. Rec. 4134; Pet. App. 66a.

execution of the ETSI contract. Pet. App. 15a-17a. In approving construction permits for the ETSI intake structure, the District Engineer stated that the validity of that contract was outside the scope of the Corps permit review, J.A. 211, and further stated that the Corps construction permit "would not constitute, or be tantamount to, such a contract." Quoted in Pet. App. p. 16a, n.8. Counsel's statement that Army currently finds Interior's position "acceptable" is simply irrelevant. Fed. Br. at 46. Army expressly eschewed involvement in the ETSI contract, and Interior cannot rely on Army approval here.

Under section 6, industrial water service contracts are limited to surplus water and cannot adversely affect existing lawful uses of the water. Interior, by contrast, considers only whether the proposed diversion will adversely affect the "irrigation efficiency" of the reservoir under the Reclamation Project Act of 1939, § 9(c), 43 U.S.C. § 485h(c).[26]

---

[26]Interior also claims it need consider only those irrigation uses which would be supplied through Interior works described in the original Pick-Sloan plans. *Upper Missouri Region, Bureau of Reclamation Summary of Statements, Letters, and Resolutions Received from Public on Proposed Water Service Contract Between ETSI and the United States*, A.R. 900,287, p. 6. States' App. 21a. The agency here refused to consider impacts on irrigation use in Nebraska on the ground that the Pick-Sloan Plan did not include use of main stem storage for projects in Nebraska. *Id.*

(Continued on following page)

It would be unreasonable to imply authority in section 9(c) to permit industrial marketing in violation of the conditions for industrial water marketing made express in section 6. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

B. This Assertion of Authority is Contrary to the Language, Purpose, and History of Section 8 Because it Expands Interior's Scope of Authority in a Manner Congress Expressly Refused to Enact.

Section 8 expressly addresses the circumstances in which reclamation law applies at Army reservoirs capable of use for irrigation. Under section 8 only "*additional works . . .* necessary *for irrigation purposes*," and not the Army reservoir project itself, are to be constructed, operated, and maintained under the reclamation laws. Specific Congressional authorization is required before con-

---

(Continued from previous page)

See also Environmental Defense Fund v. Morton, 420 F. Supp. 1037, 1044-1045 (D. Mont. 1976), aff'd. in relevant part, *sub nom. Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9 Cir. 1979) (Petitioners cite this case to support their position. (Fed. Br., p. 30, ETSI Br., pp. 21-22). The case involved reclamation reservoirs undertaken by the Secretary of the Interior, and industrial use was a specifically authorized project purpose. The case is not relevant here, and plaintiff States dispute that its conclusions would be correct at Oahe even if this Court concluded that the reclamation laws apply.)

struction of irrigation works.[27] Congress, largely at South Dakota's urging, effectively de-authorized the only irrigation work ever authorized at Oahe.[28]

The Reclamation Reform Act of 1982, § 212(a), 43 U.S.C. § 390*ll*, makes it clear reclamation law will not apply even to irrigation uses of Army reservoirs, absent the existence of project works or specific statutory directive.[29] Pet. App. 30a, n.21. Oahe is specifically listed as

---

[27]Congress inserted this requirement of specific Congressional authorization of irrigation works; it was not contained in the Interior Secretary's proposal. (Compare proposal of Secretary of Interior in H.R. 4485 Senate Hearings, p. 313, with section 8, 58 Stat. 891.)

P.L. 88-442 also requires reauthorization of any works previously authorized in the Missouri River Basin but not constructed before August 14, 1964.

[28]P.L. 97-273, 96 Stat. 1181. In 1978 the South Dakota legislature passed a law calling for a moratorium on further construction of the Oahe irrigation unit. S.D.C.L. § 46-A-1-78. In 1981 South Dakota's Senators and one Representative introduced bills to cancel construction of the Oahe Unit or to deauthorize it. S. 1374 (Sen. Pressler), S. 1553 (Sen. Abdnor), H.R. 4347 (Rep. Roberts), 97th Cong., 1st Sess.

[29]ETSI cites authorities which construed section 8 to apply the acreage limitations of the reclamation law to irrigation use of Army reservoirs despite the absence of Interior irrigation works. 41 Op. Att'y Gen. 377, 377-378, 395 (1958), ETSI Br., p. 22. *See also United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977). That construction does not assist ETSI. The ETSI contract is not for irrigation purposes, and it is thus clearly outside the scope of section 8.

The Reclamation Reform Act was specifically intended to reject that construction. The Senate Committee report stated:

> It is the general intent of this section to eliminate the shadow of applicability of the reclamation law to

(Continued on following page)

a project which would be exempt from the reclamation laws under this test. 128 Cong. Rec. 16605-16606; 16607, Table I, n.3. In the absence of Interior works, Interior has no interest in how the water is used and has no reason to market the water.

A purpose of section 8 was to subject irrigators to the payment and acreage limitations of reclamation law. *See* Pet. App. 61a. *See also* remarks of Senator Wheeler, 90 Cong. Rec. 8314; and of Senator Murray, 90 Cong. Rec. 8622. In light of Congress' purpose, it had no reason to give Interior authority to market water in Army reservoirs for any uses other than irrigation.

Interior relies on agency letters transmitting the Pick and Sloan plans to claim that Army reservoirs should be operated under regulations of the Bureau of Reclamation so far as irrigation and power functions are concerned. *See* S. Doc. 191 at 11; Fed. Br., p. 27. Compare H.R. Doc. 475 at 7 (Commissioner of the Bureau of Reclamation: " . . . the Corps of Engineers would *advise*

(Continued from previous page)

> Corps of Engineers projects in any case in which the intent of Congress concerning such applicability is not clearly and explicitly set forth in statutory language.

S.Rep. 373, 97th Cong., 2d Sess. 16 (1982). *See also* 128 Cong. Rec. 16613 (Sen. Cochran).

and *consult* with the Bureau of Reclamation in the construction, operation, and maintenance of such features.") But, the District Court noted, "Although many people discussed the division of control over the main stem reservoirs, nobody said that the Bureau's level of control over certain water stored for irrigation in Corps-built dams was so complete that the Bureau could furnish that water for non-irrigation purposes—i.e., industrial or miscellaneous uses." Pet. App. 58a-59a.[30]

The recommendation of the Chief of Engineers that the Corps have authority to prescribe regulations governing flood control storage in all federally funded reservoirs, H.R. Doc. 475 at 3-4, was adopted by Congress in section 7 of the Act. The Chief's additional suggestion that Interior be granted authority to adopt regulations for use of irrigation storage at multiple-purpose reser-

---

[30]In *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153, 159-160 (1953), this Court rejected the argument that approval of the Roanoke Basin comprehensive plan report in section 10 of the Flood Control Act of 1944 established approval of comments of the Chief of Engineers that described projects should be constructed by the Secretary of War. This Court stated:

> In any event, we do not have a recommendation for public construction that is clearly an integral part of the plan, and the decisive question is not what this or that isolated statement in the report or the comments thereon imply but how Congress may fairly be said to have received and read the report in the light of the legislative practice in relation to such public works.

345 U.S. at 160. The cited comments in the transmittal letters do not address industrial use of the main stem reservoirs and they clearly do not override what Congress subsequently expressly determined in sections 6 and 8.

voirs was embodied in section 6 of the House bill.[31] However, section 8 of the Senate bill, providing for Interior operation of separate irrigation works, was adopted instead.[32] There is a striking difference between the House version and section 8 as enacted—" . . . the former allows regulations about storage; the latter permits construction and operation of irrigation works which are added to a Corps-operated reservoir. The focus shifts from water in the reservoir to water that has been removed from the reservoir." Pet. App. 60a-61a. As a result, Army has adopted regulations governing flood control storage at

---

[31]Section 6 of the House bill, which was not enacted, provided:

> Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary of War can be consistently used for reclamation of arid lands, *it shall be the duty of the Secretary of the Interior to prescribe regulations under existing reclamation law for the use of the storage available for such purpose,* and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said storage; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts: * * *

(emphasis added). H.R. 4485 Senate Hearings at 2; H.R. Rep. 2051, 78th Cong., 2d Sess. 2, 7 (1944); 90 Cong. Rec. 9260 (1944) (amendment no. 17).

[32]ETSI and the federal defendants state that the Secretary of the Interior described the changes between the House version and section 8 as "technical." ETSI Br. at 40; Fed. Br. at 48, n.71. What Secretary Ickes actually said was that the provisions of section 6 of the House bill were "not entirely apt in their relation to the various technical features of the Federal reclamation laws." H.R. 4485 Senate Hearings at 313. See Pet. App. 60a. In other words, the concept of Interior regulatory authority over storage embodied in section 6 did not fit with the reclamation law. See also H.R. 4485 Senate Hearings at 458.

reclamation reservoirs, 33 C.F.R. § 208.11, but Interior has not adopted regulations for irrigation storage at Army reservoirs. Pet. App. 61a.

Defendants' arguments primarily rely on statements of legislators suggesting that Interior would exercise authority over irrigation features. *See* Fed. Br. p. 33, n.52; ETSI Br., p. 17. This legislative history predates the conference report in which section 8 of the Senate bill replaced section 6 of the House bill which embodied those views."[33] The legislative history of a bill that was not adopted cannot be resorted to to construe a bill that was. Congress does not intend a result that it expressly declines to enact. *Gulf Oil Corp. v. Copp Paving Company, Inc.*, 419 U.S. 186, 200 (1974). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. —, 107 S.Ct. 1207, 1219 (1987), quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting).

---

[33]The Senate Conference Committee Report regarding section 6 was delivered on Dec. 12, 1944. 90 Cong. Rec. 9259. The legislative history relied upon by the federal petitioners predate that report. Fed. Br., pp. 25-26, n.42, 43; p. 33, n.52. Their brief quotes statements only from the House debate. Contrary to their suggestion, Senator Overton merely stated that Interior would control irrigation use and operation of irrigation works, and not irrigation storage. 90 Cong. Rec. 8625.

The Solicitor General argues here that section 8 does not apply to the main stem reservoirs.[34] Fed. Br., p. 26, n.43; pp. 28-29, n.45. However, in 1981 the Commissioner of the Bureau of Reclamation stated:[35]

> . . . we have not, as of this date, required contracts for private irrigation diversions from Corps' reservoirs on the mainstem of the Columbia and Missouri Rivers; however, Reclamation law does apply to those projects based on Section 8 of the Flood Control Act of 1944.

ETSI's argument that section 8 does not apply to projects authorized in the Act is also inconsistent with the position of the United States in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), and

---

[34]The Government's brief in the Court of Appeals asserted, in contrast, that section 8 applied the reclamation law to "all Corps projects which include storage for irrigation," citing the 1958 Attorney General's opinion, 41 Op. Att'y Gen. 377. Ct. App. Br. of Federal Defendants, p. 7. The Government's brief specifically stated " . . . the rationale of the OAG applies to projects authorized by either Section [9 or 10] of the 1944 law." *Id.*, p. 36, n.18.

[35]Letter from Commissioner of the Bureau of Reclamation, Robert N. Broadbent, to Senator Henry M. Jackson, Hearings before the U.S. Senate Committee on Energy and Natural Resources (97th Cong., 1st and 2d Sess.) on S. 1867, p. 565. S. 1867 was ultimately adopted as the Reclamation Reform Act of 1982, P.L. 97-293. See pp. 23-24, supra.

In 1970 the Department also cited section 8 as the statutory authority for applying reclamation law to the main stem reservoirs during a controversy concerning whether private irrigation diverters should be required to pay water service charges. The Department ultimately determined that reclamation law would not apply to irrigation use which was not dependent upon the reservoir storage. 128 Cong. Rec. 16607-16608; Guhin, *The Law of the Missouri*, 30 S.D. L.Rev. 347, 482-485 (1985).

in 41 Op. Att'y Gen. 377, 394-395, which applied section 8 to projects authorized in section 10 of the 1944 Act.[36]

Congress defined the authority of the Secretary of the Interior at Army reservoirs in section 8 of the Act. ETSI's use is not for irrigation purposes and would not be provided through Interior works. The ETSI contract is therefore clearly outside the limited scope of authority granted the Secretary of the Interior in section 8.

C. Section 9(c) of the Act Simply Applies Reclamation Law to Reclamation Developments to be Undertaken by the Secretary of the Interior under the General Comprehensive Plans for the Missouri River.

The authority relied upon by the agency to market Oahe water for industrial use is section 9(c) of the 1944 Flood Control Act, which allegedly "incorporates" section 9(c) of the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c). 1975 Hearings, p. 53; ETSI App. pp. 113a, 114a; Memorandum of the Solicitor, J.A. 120; Pet. App. 53a-54a.

Section 9(c) of the Flood Control Act applies reclamation law only to the "reclamation and power developments to be undertaken by the Secretary of the Interior" under the plans approved in section 9(a). The District Court

---

[36]The language of section 8 also refutes ETSI's argument. Section 8 states that Army reservoirs "may be *utilized hereafter* for irrigation purposes only in conformity with the provisions of this section . . . *Provided*, That this section shall not apply to any dam or reservoir *heretofore constructed* . . ." (emphasis added). (This proviso was added to prevent section 8 from affecting on-going litigation involving an already constructed reservoir. 90 Cong. Rec. 8552-8553.)

and the Court of Appeals correctly held that Lake Oahe is not a reclamation development to be undertaken by the Secretary of the Interior under those plans. Pet. App. 17a-19a, 54a. Defendants do not attempt to establish that that finding is clearly erroneous or contrary to law. Instead ETSI criticizes the Court of Appeals for "focusing its analysis" on the controlling language in section 9(c), ETSI Br., p. 28, and Interior argues that whether Oahe fits within that language " . . . is the wrong question." Fed. Br., p. 31.

The Solicitor General now basically argues that section 9(c) simply identifies the source of law which applies to whatever Interior does in the Missouri River basin. Fed. Br., pp. 32-33. The term "development," the Solicitor General asserts, could be construed so broadly that the Secretary's execution of a water service contract is itself a "reclamation development."[37] Fed. Br., pp. 32-33. However, the Sloan Plan uses the term "development," and especially the phrase "power developments," to describe physical works. S. Doc. 191 at 16, 124, 136. Further, if the ETSI contract is a "development," it is not a "*reclam-*

---

[37]Counsel's attempt to explain how section 9(c) might be construed to include the ETSI water service contract is not entitled to deference as an agency position. "It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Securities Industry Assn. v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 143-144 (1984) quoting *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971).

ation development."[38] Finally, there is nothing to show that industrial use of Oahe was to be undertaken by the Secretary of the Interior under the Pick and Sloan Plans. Pet. App. 32a. The Solicitor's argument simply begs the question of authority.

ETSI argues that the "irrigation storage" at Oahe should be considered a reclamation development. ETSI Br., p. 31. The District Court found that there is no defined irrigation storage at Oahe.[39] Pet. App. 57a, 63a-64a. Instead the storage allocation at Oahe is divided into inactive storage, flood control, "annual flood space and multiple use," and "carry-over multiple use." Pet. App. 57a.

---

[38]Secretary Ickes' contemporaneous construction was that industrial uses do not involve reclamation. H.R. 4485 Senate Hearings at 313. The term "reclamation" is used throughout the reclamation laws to refer to the reclamation of arid land—i.e., irrigation. *See*, e.g., 43 U.S.C. § 391 (reclamation fund to be used for "irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands . . .") Just because the Secretary has a power at reclamation reservoirs does not make the exercise of that power a reclamation development. *See, e.g.*, 43 U.S.C. § 387 (power to grant easements in lands).

[39]Rather than providing any definition of this "irrigation storage," ETSI cites basin-wide figures showing that Interior's Sloan Report anticipated that more than seventy-five percent of the benefits from the overall plan would be from irrigation. *Id.* As the District Court noted, these basin-wide figures include the many reclamation reservoirs on the tributaries. Pet. App. 57a. ETSI also claims that only one-third of the storage planned for the main stem reservoirs was required for flood control and navigation, and that irrigation represented the largest single use of storage (ETSI Br., p. 31, n.23). The Senate hearings cited by ETSI show these figures to be false. Col. Reber repeatedly insisted that 10,000,000 acre-feet was a bare minimum necessary for navigation and that irrigation is not the largest use of water from main stem reservoirs. H.R. 4485 Senate Hearings, pp. 731-734.

The multiple-use storage lumps navigation, power, and irrigation storage together. *Id.* Col. Reber, Chief of Engineers, testified that water for navigation, power production, and irrigation would all be included within multiple-use storage; there would not be separate storage allocations. H.R. 4485 Senate Hearings at 729. Pet. App. 63a. Actual practice at Oahe and the other main stem reservoirs confirms this. Pet. App. 64a.

Congress did not contemplate shared jurisdiction over these reservoirs; instead, it conferred control over each reservoir on the agency which constructed it. Senator O'Mahoney stated:

> * * * [I]t was the purpose to give to the [Department of the Army] jurisdiction over [Army] dams and improvements, and to the Bureau of Reclamation jurisdiction over those which were primarily to be used for reclamation * * *.

90 Cong. Rec. 8548 (1944), quoted in Pet. App. p. 22a, n.13. As Senator Overton, Senate floor manager of H.R. 4485, declared, "[s]*omeone must have control of a dam. If it is a flood-control or navigation dam, the Secretary of War has charge of it,* and if it is an irrigation dam, the Secretary of the Interior has charge of it." 90 Cong. Rec. 8315 (1944) (emphasis added). Pet. App. 59a.

It is apparent that Oahe is a project undertaken by Army under sections 9(a) and 9(b) of the Act, and not a reclamation development to be undertaken by the Secretary of the Interior under sections 9(a) and 9(c). Section 9 thus affirms that Army not Interior, exercises the powers of the federal government with regard to industrial use of water stored at Lake Oahe.

D. Congress has the Authority to Modify the Act, and the Secretary of the Interior Should not be Permitted to Arrogate that Power.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. —, 105 S.Ct. 658, 662 (1985). *See also Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. —, 107 S.Ct. 1207, 1213 (1987).

Defendants ignore the language of the Act and replace it with their notion of the legislative intent as derived from snippets of legislative history. This is clearly improper. If the statutory language is clear, it must be given effect, at least in the absence of a patent absurdity. *Id.* at 1223, 1224 (Scalia, J., concurring). *United States v. James*, 478 U.S. —, 106 S.Ct. 3116, 3122 (1986).

In addition, defendants improperly attempt to imply an exception to the clear language of section 6. The *amici* argue that section 9 is an "act within an act." *Amici* Br., p. 10, n.6. Under their theory sections 6 and 9 of the Act apply to the Missouri River Basin while sections 6 and 8 only "tangentially apply." They read section 9 as excepting the Missouri River Basin from sections 6 and 8.

Whether an exception should be created is a question for legislative judgment, not judicial inference. It is clear that Congressmen assumed that the substantive provisions which they were debating would apply on the Missouri River. *See, e.g.*, 90 Cong. Rec. 8548 (1944) (Sen.

O'Mahoney). No one said that section 9 would except the Missouri River Basin from other provisions of the Act.[40] In dialogue after presentation of the conference report, Rep. Whittington specifically states that section 5 would apply to the Missouri River.[41] 90 Cong. Rec. 9282. Pet. App. 67a, n.3.

Where possible, the provisions of a statute must also be read so as not to create a conflict. *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. —, 106 S.Ct. 1890, 1899 (1986). Interior's construction of section 9(c) conflicts with both sections 6 and 8. It is obviously incongruous to construe the statute so that two agencies market the same water for industrial use while applying differing criteria and conditions. See Pet. App. 31a.

Interior argues that the revenues from industrial water contracts should be credited as reclamation receipts.

---

[40]The Attorney General opined in 1958 that section 8 of this Act governed projects authorized in section 10 despite any inconsistent implications from the proposing reports. 41 Op. Att'y Gen. 377, 394-395. Section 10, the Attorney General stated, resolved the issue of which agency would construct the reservoirs in question. " . . . the question of the applicability from the reclamation laws was largely discussed in connection with section 8 as it evolved." 41 Op. Att'y Gen. at 395. The same rationale requires application of the substantive provisions of the Act, here sections 6 and 8, over claimed implications to the contrary based upon section 9.

[41]Interior took the position in 1957 hearings that section 9(c) rather than section 5 governed Missouri River power marketing. Missouri Basin Water Problems: Joint Hearings Before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Public Works, 85th Cong., 1st Sess. 319 (1957) [hereinafter 1957 Hearings]. The opposite position was taken by the Assistant Chief Counsel for the Bureau of Reclamation in 1946 (1957 Hearings at 390) and the Interior Solicitor in

(Continued on following page)

This argument does not assist in divining the intent of the 1944 Congress because Interior, as late as 1957, construed the reclamation laws as not permitting payment into the reclamation fund of revenues from power generated at the Army power plants on the Missouri River.[42] 1957 Hearings at 319.

(Continued from previous page)

1950 (1957 Hearings at 369). Both concluded that section 9(c) referred only to the power developments constructed by Interior. In 1958 Congress specifically referenced section 5 in a bill concerning Missouri River Basin projects. Act of July 3, 1958, 72 Stat. 297, 311. Interior's inconsistent constructions of the effect of section 9(c) on power, which it specifically addresses, does not assist in implying authority over industrial use from section 9(c). See n.42 *infra*.

[42]The relevant reclamation law, 43 U.S.C. § 392a, provides, "[a]ll monies received by the United States in connection with any irrigation projects, including the incidental power features thereof, constructed by the Secretary of the Interior through the Bureau of Reclamation . . . shall be covered into the reclamation fund . . ."

The Department of the Interior construed this statute as not authorizing deposit of receipts from power generated at the "Corps developments" on the Missouri River into the reclamation fund. 1957 Hearings at 319, 323-24. Interior was expressly granted a power marketing function under section 9 of the Flood Control Act. Interior constructed extensive transmission facilities for this power, and the beginning clause of section 9(c) creates special exceptions to the general reclamation laws for benefits, allocation of costs, and repayments by water users. Interior could nonetheless find no authority to deposit the power revenues in the reclamation fund. 1957 Hearings at 318-319, 323-324, 329-330. Instead the Department Assistant Solicitor, Mr. Weinberg, explained " . . . in the absence of a provision in the reclamation law dealing with the deposit of revenues from projects not constructed by the Secretary of the Interior, they must, under general principles of law, be deposited in the general fund of the Treasury." 1957 Hearings at 319. Thus, under either section 9(c) or section 6, revenues from industrial contracts would presumably go into the general fund.

The treatment of power revenues has apparently been separately resolved, and that is not an issue in this case.

ETSI's petition for certiorari, at p. 19, stated that the decision below "leaves water stored for irrigation in main stem reservoirs unavailable for any new consumptive use even if this results in a decrease of power production."[43] The Army General Counsel has, however, recently opined that water in the main stem reservoirs can be marketed for industrial use.[44] Section 6, the General Counsel opined, permits "reasonable reallocations between the different project purposes." *Id.* The General Counsel concluded that the Secretary could provide municipal water supply from a reservoir at which contemplated irrigation use had not occurred so long as this would not "unreasonably impair the efficiency of the reservoir's other purposes." States' App. 18a. The plaintiff States are concerned that Army not ignore other uses. It is not, how-

---

[43]By contrast, the federal defendants' Petition for a Writ of Certiorari, p. 12, n.13, stated, "This case does not raise any question concerning the Department of the Army's authority to manage water within the mainstem reservoirs."

[44]Memorandum from Susan J. Crawford, General Counsel, Department of the Army, to the Assistant Secretary of the Army (Civil Works), *Proposed Contracts for Municipal and Industrial Water Withdrawals from Mainstem Reservoirs* (Mar. 13, 1986) (cited in Fed. Br., p. 39, n.58). States' App. 12a.

The Army General Counsel opinion, rendered the same day as the decision below, was first brought to the attention of this Court and the parties in the federal defendants' brief on the merits, p. 38, n.58. It is appropriate for the parties to inform the Court of this development. *See Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J. concurring); *Board of License Commissioners of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam).

The Army General Counsel's opinion of section 6 is highly significant as their differing construction of section 6 was the "essential difference" between the majority and the dissenting opinion below, Pet. App. 1a-44a. This was also a primary reason presented by ETSI in its petition for a writ of certiorari. ETSI Petition, pp. 19-21.

ever, appropriate to interpret a statute clearly administered by Army in a manner inconsistent with Army's interpretation in order to assert that deference should be given to Interior's assertion of implied competing authority.

Army previously construed "surplus water" as "water trapped or stored in a reservoir project which is not utilized to fulfill an authorized project purpose." *See* J.A. 209-210, ¶ 7.3(c). If the waters were in fact "unutilized," the water would be available for industrial use under that interpretation.

Any statutory limitations on Army's industrial water marketing reflect Congress' choice concerning industrial diversions from Army reservoirs. The Department of the Interior has no authority to "correct flaws that it perceives" in a statute administered by Army. *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. —, 106 S.Ct. 681, 688-689 (1986).

The dissent below construed section 6 as giving Army jurisdiction only over surplus waters and concluded that no agency would have jurisdiction over "irrigation waters." Army clearly has the authority to manage the reservoir, as the federal defendants recognize. *See* Federal Defendants' Pet. for Cert., p. 4, n.2 and Fed. Reply Br. on Pet. for Cert., pp. 3-5. Army was given the authority to market surplus water as a power incidental to the authority to operate the dams. *See United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53, 72-73 (1913) (authority of Secretary of War to market surplus water power justified as incidental to navigation).

The Corps operates the reservoir and must have the authority to determine what water is surplus to its needs.

The *amici* argue that section 6 gives the Army authority over only that water which is surplus to the needs of flood control and navigation.[45] *Amici* Br., p. 18. Ignoring the fact that water in multiple-use storage is also used to supply navigation, the *amici* contend that the Bureau has authority to contract for all of the waters in multiple-use storage. *Amici* Br., p. 19, n.11. This argument is squarely contrary to Congress' determination that Army, not Interior, should control the main stem reservoirs because their primary function is flood control and navigation.

The *amici* argue that Interior should market this water because of its allegedly greater respect for state water rights.[46] Army requires that industrial users acquire state water rights, J.A. 207, and section 6 protects uses perfected by state law. Interior, by contrast, asserted in this very case that cancellation of ETSI's state permit would not preclude performance of the federal water service contract. *See* n.62, *infra*.

---

[45]*Amici* cite the testimony of Clifford Stone. *Amici* Br. 31. Mr. Stone, however, testified that section 6 [then section 4] would govern "use other than irrigation" and that whether surplus water was available would be entirely determined by the Secretary of War. H.R. 4485 Senate Hearings at 561.

[46]The legislative history cited by federal defendants to demonstrate concern over proposed Corps' water marketing authority relates to section 4 of the House bill. *See* Fed. Br. at 8. The Senate added the proviso protecting existing uses to allay these concerns. *See* 90 Cong. Rec. 9279.

The implied authority for which defendants contend is unnecessary to further the purposes of the Act. Congress had no reason to give the Bureau authority to market water in Corps reservoirs for any uses other than irrigation. Certainly, implication of Interior authority to market water for industrial uses is not necessary to protect its legitimate interest in its irrigation functions, because the Corps' water marketing authority depends upon a prior determination that such water is "surplus" and not needed by the Bureau for irrigation.

The clear policy of Congress in recent years has been to reduce, not augment, the Bureau's authority at Army reservoirs. Interior's power marketing function was taken away in 1977 (Department of Energy Organization Act, 42 U.S.C. § 7152(a)(3)), and the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll*(a), limits the applicability of reclamation laws to irrigation use absent explicit statutory language or irrigation works. And, consistent with section 8's requirement of Congressional approval for Interior's irrigation works, Congress has required Congressional approval for modifications of reservoir projects and project purposes (Water Supply Act of 1958, 43 U.S.C. § 390b; for construction of any previously authorized Missouri Basin projects (P.L. 88-442, 78 Stat. 446 (1964)); and for any change of cost allocations in the Missouri River Basin (42 U.S.C. § 7152(a)(3)).

ETSI has abandoned its project, J.A. 257-258, and Army is now considering applications for contracts under section 6. States' App. 12a. Leaving Interior to a Congressional remedy would not cause significant harm. By avoiding the protections of section 6, Interior's assumption of this power, by contrast, leaves other uses of the main stem

reservoirs without any protection. If needed, Congress can balance the various interests at stake and fashion a remedy which this Court could not. Pet. App. 32a. *See Board of Governors*, 106 S.Ct. at 689 n.7.

II. CONGRESS DID NOT GIVE THE SECRETARY OF THE INTERIOR AUTHORITY TO OVERRIDE THE TERMS OF SECTION 6 AND EXPAND THE SCOPE OF HIS AUTHORITY AT ARMY RESERVOIRS.

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

An administrative agency has only that power delegated to it by Congress. "An agency may not confer upon itself power. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. —, 106 S.Ct. 1890, 1901-1902 (1986).

Congress directly addressed the precise question of industrial water marketing at Army reservoirs in section 6 of the Act. It also addressed the role of the Secretary of the Interior at Army reservoirs in section 8 of the Act. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect

to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. An administrative interpretation of a statute "cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). "An agency literally has no power to act, . . . unless and until Congress confers power upon it." *Louisiana Public Service Commission*, 106 S.Ct. at 1901. The Department of the Interior has no authority to correct flaws which it perceives in the Flood Control Act. *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. —, 106 S.Ct. 681, 688-689 (1986).

The 1944 Flood Control Act addresses who will market water for industrial use at Oahe. Congress did not leave that issue for the Secretary of the Interior to determine.

Deference does not apply to a pure question of law where the Congressional intent can be determined by traditional rules of statutory construction. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. —, 107 S.Ct. 1207, 1220-1221 (1987). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. *See also Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960).

Deference assumes a reasonable and adequately articulated agency construction. The administrative record for the ETSI contract shows that the agency here brushed aside all issues of statutory authority by simply citing

a 1974 unpublished memorandum from the Solicitor.[47] Pet. App. 32a-34a; 68a-69a. That legal opinion is clearly flawed. Pet. App. 34a n.25. The Solicitor's memorandum does not even mention the contrary grant of authority to Army in section 6, the rejection by Congress of amendments to confer industrial marketing authority on Interior, or the revision of section 8 to delete the proposed Interior authority to promulgate regulations for irrigation storage. Courts must set aside agency actions based on an erroneous legal foundation. *N.L.R.B. v. Brown*, 380 U.S. 278, 292 (1965).

It was unreasonable of the agency to refuse to examine the authority issue anew. Significantly, Interior did not assert unilateral marketing authority in 1974 on the basis of the Solicitor's advice. It instead executed the MOU with Army, an indication that the Department lacked confidence in the claim of unilateral authority. *See* Pet. App. 68a. Interior and Army both characterized the MOU as an interim measure while a permanent solu-

---

[47]The record illustrates that the agency decisionmaker was not informed of the question decided in this case. Thus deference would be given to those lower level employees who summarily rejected the plaintiff States' extensive arguments on this issue (A.R. 900,287, States' App. 21a and failed to bring these issues to the attention of the Secretary.

The Solicitor's opinion of November 27, 1974 (J.A. 120) was the basis for claimed authority in the memorandum approving the ETSI contract (J.A. 212); the Bureau of Reclamation summary of public comments (A.R. 900,287, States' App. 21a, and the November 5, 1980, memo setting forth procedures for the marketing program (J.A. 147).

tion was sought.[48] 1975 Hearings at 23, 31. By 1982, the agency had had seven years to seek Congressional authorization, and Congress had further limited Interior's authority at Army reservoirs. *See* p. 39, *supra*.

Deference to Interior's assertion of this authority would be absurd because equal deference would have to

---

[48]Defendants argue that the 1975 hearings show that Congress was aware of Interior's claim of unilateral marketing authority. It cannot be assumed that the committee's failure to take action on a temporary, two-year agreement premised on the joint authority of Army and Interior constituted authorization for Interior to unilaterally market water after expiration of the MOU. *See Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 120-122 (1978). There is no evidence that the committee approved the MOU or that its position either reflected the position of Congress as a whole or resulted from considered review of the particular question of Interior's *unilateral* authority. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 191-192 (1978). *See* Pet. App. 35a.

The defendants also cite a 1955 Senate report as indicating that Interior was responsible for space reserved for irrigation in any dam in the Missouri River Basin. S.Rep. 1066, 84th Cong., 1st Sess. 3 (1955). Fed. Br., pp. 48-49, n.72. The scope of Interior's authority at Army reservoirs was not an issue in the report.

The federal defendants suggest that Bureau and Corps letters to Senator Moynihan during the debate on the Reclamation Reform Act of 1982 "fully informed" Congress of the Secretary's unilateral marketing program. Fed. Br., p. 48 (text and n.72). The Bureau's letter nowhere mentions industrial use and appears directed to contracts for "irrigation water service." 128 Cong. Rec. 16607. The Corps letter indicates that there have been sales of water for industrial use from the main stem reservoirs, 128 Cong. Rec. 16611, but it does not indicate by what agency or authority this was done.

Section 212(b) of the 1982 Act, 43 U.S.C. § 390*ll*(b), provides that obligations, pursuant to contracts with Interior, to repay the share of costs allocated to irrigation storage "shall remain in effect." This section simply "preserved existing repayment requirements at Corps constructed dams." *See* Fed. Br. p. 48, n.72.

be given to the Army Counsel's view that Interior lacked independent authority for industrial water marketing.[49] Pet. App. 34a, n. 25, 69a. The Secretary attempts to avoid this problem by hinting that Army and Interior have resolved this matter and that "Army considers acceptable" the Secretary of the Interior's interpretation. (Fed. Br., p. 46). Whatever the litigation position of the Justice Department, the documents in the administrative record do not show concurrence.[50] To the contrary, the General Counsel for Army concluded, " . . . the Secretary of the Interior may not market the water from these reservoirs independently." J.A. 135. The Secretary of the Army expressed concern about the legality of even joint marketing under the MOU. J.A. 142. In 1978 Army refused to extend the MOU for that reason. J.A. 143-144. The Court of Appeals specifically found that Army did not approve the ETSI contract. (Pet. App. 15a-17a).

---

[49]This Court has given deference to an Army interpretation of a statute it was charged with enforcing. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. —, 106 S.Ct. 455 (1985).

[50]The federal defendants cannot properly assert that Army now finds Interior's assertion "acceptable." The federal defendants refused to certify a record which would include Army actions concerning the ETSI contract or the marketing program. J.A. 14-18, Docket Nos. 152, 184, 196. (Documents obtained in discovery show that the Army Assistant General Counsel for Legislation and General Law stated that Army and not Interior had marketing authority for Lake Oahe. C.A. App. 352-353.) The Corps Division Engineer who granted the ETSI construction permits refused to consider the issues plaintiffs raised concerning the validity of the water service contract. J.A. 211. (Pet. App. 16a, n.8).

The Court of Appeals correctly concluded that the Secretary of the Interior's assertion of industrial marketing authority at Oahe was beyond his statutory mandate and not entitled to judicial deference. Pet. App. 33a-34a.

III. AMICI'S ARGUMENT IS IRRELEVANT TO THE ISSUE IN THIS CASE.

Amici argue that section 1(b) of the 1944 Flood Control Act allocated stored water in favor of the upstream States and that therefore Interior, rather than Army, must market the water. *Amici* cannot raise a new issue before this Court. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60, n.2 (1981). The only substantive question resolved below is whether the Secretary of the Interior can claim authority under reclamation law to market water at Oahe for industrial use.[51] Section 1(b) does not resolve that question.[52] This Court should not decide the extraordinary

---

[51]According to an article written by an Assistant Attorney General of South Dakota, South Dakota officials in 1969 took the position that section 9(c) of the Reclamation Project Act of 1939 was not applicable to main stem reservoirs because they had not been built by the Secretary of Interior, and had not been built for irrigation. Guhin, *Law of the Missouri*, 30 S.D. L.Rev. 346, 484. They now urge inconsistently that this Court apply that law at Oahe, *Amici* Br., p. 43. At any event, it is clear that this is not a States' rights issue.

[52]Indeed the sponsor of section 1(b), Senator O'Mahoney, proposed an amendment that would have authorized Army to market water for all purposes including irrigation, from Army reservoirs. 90 Cong. Rec. 8548. *See also* Pet. App. 34a, n.25.

question whether Congress allocated the waters of the Missouri River in this judicial review proceeding.[53]

The plain purpose of legislation is determined from the plain language of the statute itself.[54] *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S.Ct. 681, 688-89 (1986). Section 6 of the Act specifically addresses industrial water marketing. *Amici* attempt to construct an interpretation, based wholly on legislative history, which is contrary to the language of the statute.

Section 1(b), however read, concerns only beneficial consumptive uses "in States lying wholly or partly west of the ninety-eighth meridian." ETSI would merely withdraw the water in South Dakota; the water would be pumped 276 miles to Wyoming to be injected into a pipeline to transport slurried coal to Arkansas, the site of use. ETSI EIS, pp. 1-60, A.R. 900,331, C.A. App. 387; Pet. App. 7a. The Wyoming State Engineer could grant a water permit to ETSI only if it met detailed requirements including a finding that the use "will not interfere with do-

---

[53]Not all of the States along this major river are before the Court. The United States agrees that the Flood Control Act of 1944 does not apportion the waters of the Missouri River. Br. of the United States as *Amicus Curiae*, No. 103 Orig., p. 9. The Flood Control Act contains no express appropriation provision and it is totally unlike the Boulder Canyon Project Act at issue in *Arizona v. California*, 373 U.S. 546 (1963). We would also refer the Court to the Brief of Defendants Missouri, Iowa and Nebraska in Opposition to Motion to File, No. 103 Orig.

[54]The Act forwards the policy of protection of local uses through requiring State review of new federal projects in sections 1(a) and (c) of the Act and by providing for the many tributary reservoirs built primarily for consumptive use.

nestic, municipal, stock watering or irrigation uses or *other existing beneficial uses within Wyoming.*" Wyo. Statutes § 41-3-115(d)(ii) (1987). The ETSI use was clearly not a beneficial use within either South Dakota or Wyoming.[55] Section 1(b) is not applicable to the facts of this case.[56]

Section 1(b) did not resolve an interstate controversy nor did it allocate stored waters at Oahe, as claimed by *amici*.[57] A fair reading of the legislative history shows that

---

[55]*Amici* States of North Dakota, Wyoming and Montana are parties to the Yellowstone River Compact, which prohibits transbasin diversions of water without unanimous consent of the signatory states. 65 Stat. 663, Article X. *See Intake Water Company v. Yellowstone River Compact*, 769 F.2d 568 (9th Cir. 1985), *cert. denied* 105 S.Ct. 316 (1986). *See also* Wyo. Stat. § 41-3-115 (1987) (requiring legislative approval for out-of-state water diversions); Mont. Codes Ann. §§ 85-2-311(3), 85-2-402(5) (imposing strict requirements on out-of-state uses of water).

[56]Among the remaining issues pending in the District Court is whether a transportation use or a transbasin diversion may be authorized at Oahe. It is ironic that the provisions of section 1(b) would be cited in favor of a coal slurry pipeline which is also a transportation use but one which is, unlike navigation, totally consumptive and exclusive.

[57]*See* 90 Cong. Rec. 8374 (Sen. Overton, "The other question was as to whether there was not an irreconcilable conflict between the lower Missouri Valley people and the upper Missouri Valley people. There is no irreconcilable conflict."). Governor Sharpe of South Dakota in 1944 testified before a Congressional committee that western states should not have unfettered right to appropriate all waters within their borders without regard to needs of downstream users. H.R. 4485 Senate Hearings at 482-483. Governor Sharpe clearly recognized the need for federal oversight of such an important interstate stream as the Missouri. *Id.*

the upstream states were concerned that the federal government, under recent Commerce Clause cases, could demand all of the waters of the tributaries to maintain the water level necessary for navigation and deprive them of water for in-state uses.[58] *See, e.g., Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1940). Section 1(b) is part of the general policy statement of section 1, and should not be read to override later, more specific sections of the Act. It does not purpot to delineate authority between Army and Interior over stored waters.[59]

This case does not involve irrigation, and would not affect *amici's* irrigation use, or Interior's authority to use water for irrigation.[60] The plaintiff states have not challenged the upstream states' authority to issue water permits. South Dakota agreed that ETSI's use of stored

---

[58]90 Cong. Rec. 4139 (Rep. Troutman); 90 Cong. Rec. 4216 (Rep. Sullivan).

[59]*Amici* concede that Army "may have a different view" of the effect of section 1(b) on the withdrawal of stored waters from federal reservoirs. *Amici* Br., p. 14, n.9. *Amici* do not provide Army's interpretation, which of course should be considered in resolving the effect of section 1(b) on a reservoir under Army's primary jurisdiction.

[60]*Amici* claim, without citation of authority, that irrigation and reclamation uses include industrial use. *Amici* Br., p. 32. Secretary of Interior Ickes recognized these uses are distinct. H.R. 4485 Senate Hearings at 312; *see also* 90 Cong. Rec. 4197 (Rep. Whittington).

waters would require federal approval,[61] and ETSI no longer has a state permit. There is no case or controversy as to any issue of state authority,[62] and this case does not present an interstate dispute. The arguments of the *amici* should be rejected.

———o———

[61]Letter, Warren Neufeld, Sec'y, S.D. Dept. of Water & Natural Resources, Feb. 9, 1981, C.A. App. 212; Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Pipeline Project, J.A. 152.

[62]The State of South Dakota originally sought to intervene in the case below. J.A. 4, Docket No. 10. On January 13, 1983, the Magistrate denied South Dakota's motion to intervene, holding that this case did not challenge South Dakota's water rights or authority, but only the actions of federal officials. J.A. 6, Docket No. 51. One month later, South Dakota withdrew its motion to intervene and its appeal of that decision and successfully requested leave to appear as *amicus curiae*. J.A. 7, Docket Nos. 64, 65.

Later both South Dakota and the Bureau of Reclamation argued that cancellation of ETSI's state permit would not preclude performance of the federal water service contract. Fed. Defendants Reply Br. [on Mootness], Ct. App., Apr. 1, 1985, pp. 9-12; Letter from Doyle, Asst. S.D. Att'y Gen., to Gans, Deputy Clerk, U.S. Ct. of Appeals, Apr. 15, 1985.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

STATE OF MISSOURI
WILLIAM L. WEBSTER
Attorney General
CURTIS F. THOMPSON
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Tel. (314) 751-3321

STATE OF IOWA
THOMAS J. MILLER
Attorney General
ELIZABETH M. OSENBAUGH
Deputy Attorney General
ELIZA OVROM
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
Tel. (515) 281-5351

STATE OF NEBRASKA
ROBERT M. SPIRE
Attorney General
LE ROY W. SIEVERS
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

ADDENDUM

Flood Control Act of 1944, ch. 665, 58 Stat. 887, 887-898

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investi-

gations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the

Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and pur-

poses incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

SEC. 2. That the words "flood control" as used in section 1 of the Act of June 22, 1936, shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

SEC. 3. That section 3 of the Act approved June 22, 1936 (Public Numbered 738, Seventy-fourth Congress), as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress), shall apply to all works authorized in this Act, except that for any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: *Provided*, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

SEC. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided*, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, with-

out charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be ap-

propriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided,* That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided,* That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio

River in accordance with such instructions as may be issued by the War Department.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided,* That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Sev-

enty-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommenations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided,* That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further,* That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further,* That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Depart-

ment when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

* * *

(SEAL)

DEPARTMENT OF THE ARMY
Office of the General Counsel
Washington, DC 20310

13 March 1986

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

SUBJECT: Proposed Contracts for Municipal and Industrial Water Withdrawals from Main Stem Missouri Reservoirs

This responds to your memorandum of 25 October 1985, requesting my views on the adequacy of two water withdrawal contracts. The contracts grant the city of Parshall, North Dakota (Parshall) and the North Dakota State Water Commission (NDSWC) privileges to withdraw water from Lake Sakakawea for municipal and industrial purposes.

Lake Sakakawea was formed by the waters of the Missouri River stored behind the Garrison dam. The Garrison dam is one of six Missouri main stem dams authorized by section 9(a) of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887. Pursuant to section 9(a), more commonly referred to as the Pick-Sloan Missouri River Basin Program, the six main stem dams are operated as a coordinated unit providing flood control protection, storage to enhance downstream navigation during prolonged droughts, hydropower storage, and storage of waters for irrigation.

The contracts provide that at a future date Parshall and NDSWC will agree to pay reasonable consideration

based upon benefits received. It is my understanding that the consideration will amount to a charge for reservoir storage needed to fulfill the withdrawal demands of Parshall and NDSWC. Parshall and NDSWC, as well as any future local users, will be charged only for storage that exceeds the amount of water that would have been provided by the natural flow of the Missouri River had the Pick-Sloan reservoirs not been constructed.

-2-

In my opinion section 6 of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, *codified at* 33 U.S.C. § 708, authorizes your office to enter into the proposed contracts with Parshall and NDSWC. Section 6 provides that:

> The Secretary of the Army is authorized to make contracts with states, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided,* That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

At issue in the Parshall and NDSWC contracts is whether surplus water exists in Lake Sakakawea. Certain legal opinions from the Corps of Engineers suggest that water in the main stem reservoirs would not be available for municipal or industrial purposes so long as the water is otherwise being used, or could be used, for the purposes specifically identified in the Pick-Sloan program. Under this analysis there is no surplus water in Lake Sakakawea

because all water not actually needed for irrigation or otherwise held within the reservoirs for navigation purposes, could eventually be discharged through the generators to produce hydroelectric power.

In my opinion, this interpretation of what constitutes surplus water is unnecessarily narrow. Under the authority of section 6 of the Flood Control Act, your office, acting for the Secretary of the Army, has broad discretion in marketing waters trapped in Corps of Engineers reservoirs. Congress made clear that section 6 of the Flood Control Act would give the Secretary of the Army authority equivalent to the authority of the Bureau of Reclamation pursuant to the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c).

-3-

During congressional debate over section 6 of the Flood Control Act of 1944, the House bill's sponsor explained the purpose of section 6 as follows:

> Section [6] provides that if there is a town or a city or a municipality that needs an additional water supply—and water is just as essential for human beings as it is for crops—the [Secretary of the Army] shall have the right to provide that that water shall be used there for the purpose of supplying the needs of man. It strikes me that the provision is a power that now obtains under the reclamation law. If it obtains under the reclamation law, I know of no good reason why it should not obtain in the existing bill.

90 Cong. Rec. 4125 (daily ed. May 8, 1944) (statement of Rep. Whittington). Later in the debate Congressman Whittington added the following:

> My recollection is that under the reclamation acts, and in the distribution of water under those acts, the Secretary of the Interior has the power to do in reclamation districts just what the [Secretary of the Army] would have power to do in reservoir districts. *This [section] is to make comparable the powers exercised by the Director of Reclamation and the [Secretary of the Army] and would apply only to waters that were surplus and not needed for irrigation or other purposes.*

Id. at 4134 (emphasis added).

Federal reclamation law grants the Secretary of the Interior broad discretion in marketing water stored in Bureau of Reclamation reservoirs and electric power produced at those reservoirs. Section 9(c) of the Reclamation Projects Act of 1939, P.L. 76-260, authorizes the Secretary of the Interior to enter into contracts for municipal water supply and the sale of electric power or lease of power privileges. 43 U.S.C.

§ 485h(c). This authority is limited by the requirement that "[n]o contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." *Id.*

This provision has been interpreted to authorize the Secretary of the Interior to sell to municipal and industrial users water that was originally intended for use in irrigation but is not presently needed for that purpose. *See Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976) *reversed on other grounds Environmental Defense Fund v. Andrus*, 596 F.2d 848 (9th Cir. 1979); *see*

also State of Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984); *Review of Federal Marketing Practices*, Decision of Comptroller General, Sep. 25, 1981, B-198376, B-198377, B-198378-O.M. (unpublished); *Clarification of Provisions of Water Supply Act of 1958 and the Reclamation Act of 1939*, Decision of Comptroller General, Nov. 14, 1979, B-157984-O.M.

In my opinion section 6 of the Flood Control Act gives the Secretary of the Army similar authority to market water stored in the Pick-Sloan flood control reservoirs. The Reclamation Projects Act authorizes the Secretary of Interior to reallocate and market water not needed to fulfill the paramount reclamation purpose of irrigation. Section 6 of the Flood Control Act provides the Secretary of the Army similar authority with regard to water he determines is not needed to fulfill a project purpose in Army reservoirs.

Courts have been deferential to the Secretary of Interior's determinations that the sale of water for municipal water supply does not impair the project's irrigation purpose. *Environmental Defense Fund v. Morton*, 420 F. Supp. at 1045. The legislative history of section 6 of the Flood Control Act implies that the Secretary of the Army's determinations with respect to water stored in Corps reservoirs are to be granted the same deference. In *United States v. 361.91 Acres of Land*, the district court held that:

> The function of carrying out the overall plan for the development of the Missouri

> River Basin has been delegated by Congress to the Department of [the Army] and Interior, and the Secretaries of those Departments have been vested with a wide discretion in carrying out such plan, and the courts have little or no authority to interfere with the exercise of that discretion.

Environmental Defense Fund v. Morton, 420 F. Supp. at 1043 *quoting United States v. 361.91 Acres of Land*, Civil No. 994 (D. Mont. 1965)

It is my understanding that none of the water stored in Lake Sakakawea is being withdrawn for irrigation purposes. Rather, discharges from Lake Sakakawea flow through the Garrison dam hydro-turbines to produce electricity. In my opinion the Secretary of the Army has the discretion to market water in Lake Sakakawea even if this results in a decrease of the project's actual or potential power production. Section 6 was included in the Flood Control Act to empower the Secretary of the Army to make reasonable reallocations between the different project purposes.

During congressional debate on Section 6, Congressman Whittington stated:

> It happens in many cases that there is a need, as the War Department has reported to the committee, for water for human consumption because of the drying up of wells. If that need occurs in Ohio, or if that need occurs in Massachusetts, or in any other State, instead of requiring the local people in the first instance where there is inability in many cases to issue bonds and to incur large indebtedness to share in the construction of that reservoir, the purpose of section [6] is to enable the Government, the Secretary of War, and the Chief of Engineers to make a disposition of water there for human consumption or for any proper in-

> dustrial use. . . . I submit Mr. Chairman, that if it be proper to provide for the storing of waters for reclamation to grow crops in the arid West,
>
> -6-
>
> with which I am in sympathy, it ought to be all the more in order to provide for the storing of waters for human consumption.

90 Cong. Rec. 4197 (daily ed. May 9, 1944) (statement of Rep. Whittington).

This indicates an intention to put water needs for other human uses on a par with water needs for irrigation. That, in turn, would give the Secretary authority to balance such needs against the need for water for other purposes, such as hydropower, specifically identified in the Pick-Sloan program.

In the case of Lake Sakakawea the argument for making water available for these other human uses is even stronger. It was originally intended that water from the reservoir would be used for irrigation, but none is being used for that purpose. That "unused" water, at least, surely can be considered surplus water within the meaning of section 6. Thus, section 6 gives the Secretary of the Army discretion to determine whether this water should be used to provide municipal water supply, at least to the extent that his decision does not unreasonably impair the efficiency of the reservoir's other purposes. Cf. 43 U.S.C. § 485h(c).

Although arguably not required by section 6 of the 1944 Flood Control Act, I suggest that the Department of the Army and the Department of Interior enter into a memorandum of understanding outlining plans for present

and future irrigation use of the Lake Sakakawea waters. This would facilitate a determination as to how much surplus water will be available for marketing. Documentation of the availability is desirable both for planning purposes and to ensure that the Army is not exceeding its section 6 authority.

Additionally, I suggest that the contracts be amended to incorporate the comments of Major General Hatch at paragraph 2d of his 16 October 1985 memorandum. Specifically, in order to make the draft contracts consistent with the form contract in ER 1105-2-20 Appendix B, the second WHEREAS clause should be modified to state that the contract is entered into under the authority of the 1944 Flood Control Act. Also, in the interest of minimizing any future dis-

putes, Article 5 should explain the intended compensation formula. Similarly, Articles 5 and 6 should explain that the water charge will not change over time except to reflect updated operation, maintenance, and replacement costs.

If we may be of any additional assistance in this matter, please do not hesitate to call.

/s/ Susan J. Crawford
Susan J. Crawford
General Counsel

UPPER MISSOURI REGION, BUREAU OF RECLAMATION SUMMARY OF STATEMENTS, LETTERS, AND RESOLUTIONS RECEIVED FROM PUBLIC ON PROPOSED WATER SERVICE CONTRACT BETWEEN ETSI AND THE UNITED STATES -
(A.R. 900,287)

* * *

(9) State of Nebraska
Department of Justice
January 7, 1982, Letter

* * *

6. The irrigation of additional land in Nebraska will be required over the next 40 years and it is probable this will require Missouri River water.

Response—The plan for the Pick-Sloan Missouri Basin Program (P-SMBP) does not include the use of storage water from the Corps' Missouri River reservoirs for projects in Nebraska. All the future irrigation projects with storage cost assignments are in Montana, North Dakota, and South Dakota. A change in area of use could probably be made since water would likely be available. The proposed ETSI use should not impact such a determination.

* * *

8. Concerned that no surplus exists to provide up to 1 million acre-feet of water annually from Missouri River reservoirs until about 2035.

Response—Storage allocations to the future irrigation units of the P-SMBP in Montana, North Dakota, and South Dakota that are not scheduled for development until after 2025 would provide this surplus.

9. No consideration was given to the High Plains Study when the surplus was determined.

Response—The High Plains Study area has no call on storage from the P-SMBP main-stem reservoirs. The determination that the ETSI contract will not impair the efficiency of the project for irrigation is related only to the P-SMBP plan as it was authorized.

* * *

(11) Attorney General of Iowa
January 8, 1982, Letter

* * *

5. Questions the legality of the contract in detail.

Response—The November 27, 1974, opinion by the Solicitor concludes that the Secretary of the Interior does have authority to enter into industrial water service contracts. That opinion points out, "Where because of changed circumstances it is not feasible to market, within the time periods originally contemplated, the amount of water available from the reservoir capacity provided for irrigation and the probable extent of future irrigation, you have not only the authority but, in my opinion, the responsibility as well, to apply that water to another beneficial use, such as municipal and industrial purposes."

* * *

(12) Attorney General of Missouri
January 8, 1982, Letter

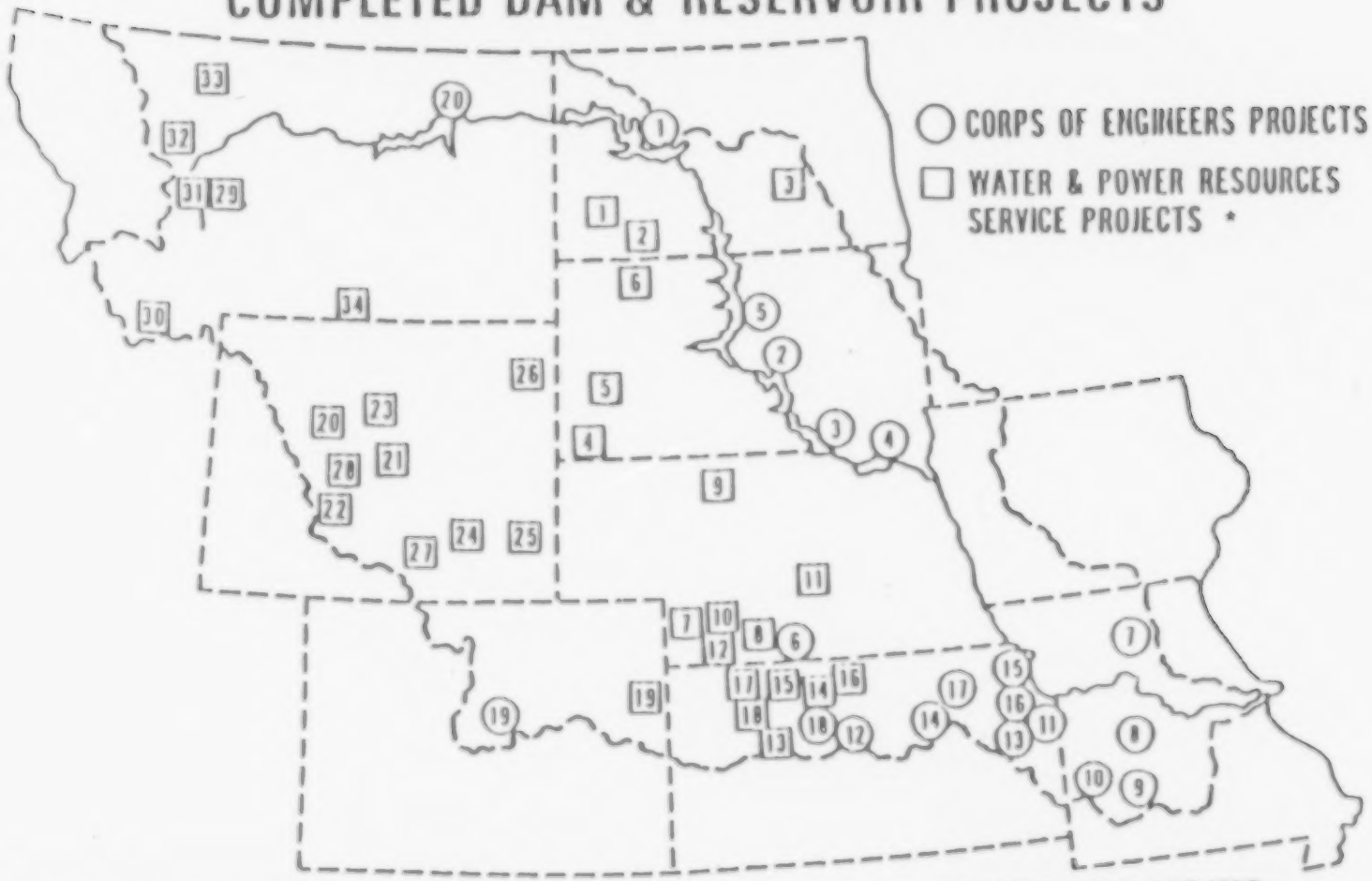
* * *

5. There are basic questions of the Federal Government's authority to execute the contract.

Response—The Secretary of the Interior's authority to market industrial water from surpluses available from future irrigation storage assignments was confirmed by Solicitor's opinion of November 27, 1974. This opinion concluded, in part, that the Secretary not only has the authority but the responsibility to market water for industrial use.

* * *

PICK-SLOAN MISSOURI BASIN PROGRAM
COMPLETED DAM & RESERVOIR PROJECTS



* Bureau of Reclamation

OCTOBER 1982 COE-MRD

FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-939, 86-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETSI PIPELINE PROJECT,
Petitioner,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF OF PETITIONER ETSI PIPELINE PROJECT

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
BARBARA L. SLOAN
HOGAN & HARTSON
(a partnership including professional corporations)
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6544
Counsel for Petitioner ETSI Pipeline Project

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. Section 6 of the Flood Control Act Does Not Preclude Interior's Authority to Market Water at Oahe	3
II. Section 8 of the Flood Control Act Does Not Preclude Interior's Contract with ETSI	8
III. Section 9 of the Flood Control Act and the Pick-Sloan Documents Incorporated Therein Gave Interior the Authority to Approve the ETSI Contract	10
IV. The Reclamation Reform Act of 1982 Expressly Preserves Interior's Contracting Authority at Corps-Built Reservoirs	13
V. The Secretary's Interpretation of Section 9 Is Entitled to Deference	14
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Bowen v. *American Hospital Ass'n*, 106 S. Ct. 2101 (1986) 18
Bowman Transportation, Inc. v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281 (1974) 18
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 17
Lawrence County v. *Ladd Deadwood School District No. 40-1*, 469 U.S. 256 (1985) 19
Trinity County Public Utilities v. *Harrington*, 781 F.2d 163 (9th Cir. 1986) 12
United States v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985) 15, 19
United States v. *Rutherford*, 442 U.S. 544 (1979) 19
United States v. *Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977) 13
United States ex. rel. Chapman v. *FPC*, 345 U.S. 153 (1953) 11

STATUTES AND REGULATIONS

Flood Control Act of 1944
Section 1, 33 U.S.C. § 701-2 (1982) 6
Section 6, 33 U.S.C. § 708 (1982) ..... *passim*
Section 8, 43 U.S.C. § 390 (1982) ..... *passim*
Section 9, Pub. L. No. 78-534, 58 Stat. 887 ..... *passim*
Reclamation Project Act of 1939
Section 9, 43 U.S.C. § 485h (1982) 4, 6, 12
Reclamation Reform Act of 1982
Section 212, 43 U.S.C. § 390*ll* (1982) 1, 2, 8, 13-14, 17, 19

CONGRESSIONAL MATERIALS

Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944) 7
S. Rep. No. 373, 97th Cong., 2d Sess. (1982) 13
S. Doc. No. 191, 78th Cong., 2d Sess. (1944) 6, 12
S. Doc. No. 247, 78th Cong., 2d Sess. (1944) 6, 9, 10, 12

TABLE OF AUTHORITIES—Continued

	Page
H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944)	6, 12
90 Cong. Rec. 4197 (1944)	5, 6
90 Cong. Rec. 4205 (1944)	10
90 Cong. Rec. 4206 (1944)	10
90 Cong. Rec. 8315 (1944)	7
90 Cong. Rec. 8548 (1944)	5
90 Cong. Rec. 8549 (1944)	5
90 Cong. Rec. 8550 (1944)	5
90 Cong. Rec. 8555 (1944)	10
90 Cong. Rec. 8556 (1944)	10
90 Cong. Rec. 8670 (1944)	10
90 Cong. Rec. 8674 (1944)	10
90 Cong. Rec. 8675 (1944)	5, 10
90 Cong. Rec. 8676 (1944)	10
90 Cong. Rec. 9279 (1944)	10
128 Cong. Rec. 16607 (1982)	14
128 Cong. Rec. 16608 (1982)	14
128 Cong. Rec. 16609 (1982)	13, 14
128 Cong. Rec. 16611 (1982)	14
128 Cong. Rec. 16612 (1982)	14
128 Cong. Rec. 16614 (1982)	7, 8
OTHER MATERIALS	
41 Op. Att'y Gen. 377 (1958)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 86-939, 86-941

ETSI PIPELINE PROJECT,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF OF PETITIONER ETSI PIPELINE PROJECT

ARGUMENT

This case asks whether the Secretary of the Interior (the "Secretary") has authority under Section 9 of the Flood Control Act of 1944 (the "1944 Act") to market unused irrigation storage at main stem reservoirs built by the Army Corps of Engineers (the "Corps") in the Missouri River Basin. The Secretary has determined that he has that authority. In its brief, ETSI Pipeline Project ("ETSI") showed that this determination accords with congressional intent, furthers the policies of the 1944 Act, was approved by Congress in Section 212 (b) of the Reclamation Reform Act of 1982 (the "1982 Act"), and is therefore eminently reasonable and entitled to deference.

Respondents challenge the Secretary's determination on four principal grounds. First, they contend that the Secretary erred by looking to Section 9 at all and should have been guided instead by Sections 6 and 8. They say Section 6 plainly grants the Corps authority over the unused irrigation storage; accordingly, Congress could not have elsewhere granted Interior concurrent jurisdiction or else the statute would produce hopeless conflict between the two agencies.

Next, respondents contradict their claim about the preclusive effect of Section 6 and argue that Section 8 defines the circumstances in which the two agencies' concurrent jurisdiction does indeed exist. Respondents say those circumstances have not been met here because the authorizations required from the Corps and Congress under Section 8 have not been given.

Then, further contradicting their contention that the Corps has exclusive authority, respondents come at last to Section 9, the section that really matters. Although they acknowledge that Section 9 gives the Secretary authority to market unused irrigation storage at Corps dams, they contend he may do so only after completing the construction of irrigation "works." That, they say, is the unassailable meaning of Section 9's reference to "reclamation . . . developments to be undertaken by the Secretary of the Interior under [the Pick-Sloan Plan]." Respondents add that any doubt about the "works" requirement was removed by Section 212(a) of the 1982 Act.

Finally, respondents assume that their previous contentions are correct and argue that the Secretary is entitled to no deference because he is not empowered to administer Section 9 at all, because his view is plainly contradicted by Sections 6, 8, and 212, and because his view has wavered and been at odds with that of the Corps.

ETSI demonstrates in this reply that respondents' contentions are not correct and that the Secretary's determi-

nation that he had authority to contract with ETSI should stand.

I. Section 6 of the Flood Control Act Does Not Preclude Interior's Authority to Market Water at Oahe.

The linchpin of respondents' entire argument is Section 6. They assert that it plainly grants the Corps marketing authority over unused irrigation water stored in Corps-built reservoirs in the Missouri Basin, necessarily leaving no such authority to Interior. There are two answers to this contention. First, it is not at all clear that the Corps' "surplus water" authority under Section 6 includes unused irrigation storage. Second, and more importantly, even if the Corps has authority over that storage, nothing whatsoever in Section 6 or its legislative history indicates that such authority is to be exclusive.

Until the District Court barred Interior from contracting for the beneficial use of excess irrigation storage, the Corps had concluded that it could not exercise its Section 6 marketing authority over such storage because it did not constitute "surplus" water. J.A. 209-210.[1] No doubt influenced by the District Court's decision that Interior likewise lacks authority over the storage—a decision which effectively rendered vast volumes of water unavailable for *any* beneficial consumptive use—the General Counsel of the Army in the midst of this litigation reinterpreted Section 6 to "empower the Secretary of the Army to make reasonable reallocations between the different project purposes," including from irrigation to

---

[1] The following abbreviations are used in this brief: "ETSI Br." refers to the Brief on the Merits of ETSI Pipeline Project; "ETSI App." refers to the Appendix to that brief; "Pet. App." refers to the Appendix to ETSI's Petition for Certiorari; "Ry Br." refers to the Opposition Brief of Respondents Kansas City Southern Railway, *et al.*; "Ry App." refers to the Appendix to that brief; "States Br." refers to the Opposition Brief of Respondents the State of Missouri, *et al.*; "J.A." refers to the Joint Appendix filed in conjunction with the briefs on the merits in this case; "A.R." refers to the Administrative Record filed with the district court.

municipal use, and to contract for the use of that water. Ry App. 14a-15a.

It is not at all clear that the Corps' new interpretation is correct or that it would survive judicial scrutiny.[2] Indeed, while respondents now ask this Court to invalidate Interior's action on the ground that only the Corps could lawfully contract with ETSI,[3] in their Complaints they assert that there is *no* surplus water at Oahe and that the ETSI contract is thus invalid not only under Section 9 but under Section 6 as well.[4]

More importantly, even if the Corps' new view of *its* authority over irrigation storage were upheld, nothing in Army General Counsel's opinion, or in Section 6, or in the legislative history of Section 6 even remotely suggests that *Interior* is ousted of *its* authority over the water. Indeed, the legislative history cited by respondents demonstrates, if anything, that Congress intended that *neither* agency have exclusive jurisdiction.

Thus, respondents first stress the Senate Committee's failure to adopt an amendment to Section 6 proposed by

---

[2] Significantly, Army Counsel noted that the authority should be exercised in accordance with the provisions of the reclamation law which, on their face, apply only to Interior. Ry App. 15a (citing 43 U.S.C. § 485h(c)). The Assistant Secretary of the Army also cautioned that this newly-discovered authority should be exercised sparingly. *Id.* at 16a-17a.

[3] It would be particularly ironic if, based on the new Army Counsel opinion, ETSI were now told that it should have contracted with the Corps. ETSI in fact first applied to the Corps for a water service contract. A.R. 930,330. While the Corps acknowledged that there was water available for industrial use at Oahe, A.R. 930,331, it never acted on ETSI's application—apparently because of its interpretation of the limits on its authority under Section 6. *See* J.A. 133. Because Interior's marketing authority is not limited to "surplus water" as defined by the Corps, when the Corps failed to act, ETSI turned to Interior for its contract.

[4] Railway Third Amended Complaint ¶¶ 78, 101; States Amended Complaint ¶ 85. *See also* States Opposition to ETSI Petition for Certiorari at 8 n.5 (noting opposition to the proposed redefinition of surplus water).

Secretary Ickes that would have given *Interior* exclusive control over water marketing authority at any Corps-built reservoir utilized for irrigation purposes.[5] *See* Ry Br. at 37; States Br. at 19-20. This failure, however, simply confirms Congress' determination to balance the power of the two agencies in furtherance of its vision of shared authority and cooperation in the Missouri Basin.[6]

Second, respondents rely on the House's rejection of an amendment to Section 6 which would have provided that, at any reservoir west of the 97th meridian, "the right to the use of waters for [domestic and industrial] purposes shall be established . . . pursuant to the provisions of the Federal Reclamation laws." 90 Cong. Rec. 4197 (1944). This amendment, however, was directed not at Interior's authority but rather at the preservation of a well-established principle under the reclamation laws—that state law should govern the acquisition of water rights at federal reservoirs in the arid Western states.[7] Opposition to the amendment likewise did not

---

[5] ETSI has previously shown that the Secretary himself abandoned the proposal after Senator Overton reminded him of another provision in the pending Rivers and Harbors bill (apparently very similar to what was adopted as Section 8) designed to address the Secretary's concerns. ETSI Br. at 42-44. Respondents purport to discredit this analysis. *See* Ry Br. at 37 n.41 (citing 90 Cong. Rec. 8675 (1944)). ETSI is at a loss to understand their criticism, however, because the authority they cite has nothing to do with the point in question.

[6] Indeed, just as Congress rejected the proposal to give Interior such authority at Corps-built reservoirs, it likewise rejected amendments to Section 6 that would have increased Corps authority at the expense of Interior. *E.g.*, 90 Cong. Rec. 8548-50 (1944) (rejecting an amendment that would have permitted the Corps to market water for all purposes including irrigation at reservoirs it operates).

[7] As Representative Robinson, the amendment's sponsor, explained: "As [Section 6] now stands, the exercise of authority under it, if unchallenged, will amount to an assertion by the Federal Government of a claim of ownership to water for domestic and industrial purposes, without regard to local law." 90 Cong. Rec. 4197 (1944).

focus on Interior. Representative Whittington pointed out that Section 6 was designed to give the Corps marketing authority for the first time, principally at reservoirs where there was no intended irrigation function at all. *Id.* Thus, he explained, the amendment was "utterly inapplicable" because Section 6 "in no way involves reclamation." *Id.* That view prevailed.[8]

Respondents' contention that Section 6 must be read to give the Corps exclusive jurisdiction over irrigation storage is not only unsupported by the language and legislative history of that section; it is also based on a fundamental misperception about the entire Flood Control Act. As ETSI has previously shown, the concept of cooperative jurisdiction permeates the entire 1944 Act and the Pick-Sloan Plan for the Missouri Basin in particular. Indeed, the overriding premise of the Act and the Plan was that the Corps and Interior would share responsibility for development of major multiple-purpose federal water projects.[9]

Unable otherwise to show that Congress intended that the Corps have exclusive industrial water marketing authority at Missouri River main stem reservoirs, respondents rest on their unsupported speculation that coordi-

---

[8] As with the proposed Senate amendment, there was no suggestion that Congress thereby intended to take away Interior's established marketing authority over water stored for irrigation. Rather, it suggests that Congress did not intend "surplus water" to include unused irrigation storage.

[9] The concept of shared jurisdiction and cooperative development was reflected in the very structure of the 1944 Act. *Compare* § 1(a) *with* § 1(c); § 9(b) *with* § 9(c); § 9(d) *with* § 9(e); § 6 of the 1944 Act *with* § 9(c) of the 1939 Reclamation Act (incorporated under §§ 8 and 9 of the 1944 Act). It was also plainly articulated in the Pick-Sloan documents approved in the Act. *E.g.*, S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944), ETSI App. 98a; S. Doc. No. 191, 78th Cong., 2d Sess. 11 (1944), ETSI App. 68a; H.R. Doc. No. 475, 78th Cong., 2d Sess. 3-4 (1944), ETSI App. 7a-8a. *See also* ETSI Br. at 11-19.

nate jurisdiction at the multiple-purpose reservoirs would give rise to agency conflict and administrative chaos.[10] The Court might properly weigh this concern if it were being voiced by Interior or the Corps, or if the implementation of the Act demonstrated any conflict. In fact, neither agency makes any such claim, and the record shows a long and successful history of interagency cooperation at the multiple-purpose projects.

Thus, in furtherance of the 1975 Memorandum of Understanding ("MOU") for a joint industrial water marketing program, Interior and the Corps mutually determined the volume of irrigation water that could be made available for industrial water use. ETSI App. 114a-116a. Since the MOU expired, Interior has continued to consult with the Corps about proposed contracts, and it requires water users to obtain a permit from the Corps for the withdrawal of water from any Corps-operated reservoir, J.A. 227-28, as ETSI did. A.R. 930,314. Even the March 1986 Army General Counsel's opinion emphasizes the continuing need for cooperation and coordination between Interior and the Corps in any water marketing program. Ry App. 15a.

Moreover, at least twice since the issue of industrial water marketing arose, both agencies have advised Congress that they view Interior's marketing of water at Corps-built reservoirs under Section 9 as entirely workable. *See* ETSI App. 105a-123a; 128 Cong. Rec. 16614 (1982). Indeed, when the 1982 Act was pending, the

---

[10] The favorite platitude of respondents seems to be a quote from Senator Overton that "[s]omeone must have control of a dam." *See* Ry Br. at 4 n.8; States Br. at 32 (quoting 90 Cong. Rec. 8315 (1944)). He also said, however, "[w]here a dam is predominantly for flood control, it ought to be constructed by the Army engineers and be under their control, *and then the surface storage required for irrigation* and the use of water for irrigation *is under the control of the Bureau of Reclamation.*" *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. 262 (1944) (emphasis added). Thus, he fully supported concurrent jurisdiction at these reservoirs.

Corps opposed any change in the system of shared jurisdiction, 128 Cong. Rec. 16614 (1982),[11] and Interior concurred. *Id.* In the face of this record of successful cooperation, it is highly presumptuous for respondents—or the courts—to tell the two agencies that Congress' plan for concurrent jurisdiction cannot work.[12]

II. Section 8 of the Flood Control Act Does Not Preclude Interior's Contract with ETSI.

Respondents assert that, under Section 8, Interior has no jurisdiction at Corps-built reservoirs until it obtains

---

[11] Acknowledging that the issue had caused confusion in the past, the Assistant Secretary of the Army explained that a provision which was intended to preserve and confirm Interior's existing authority (and which was ultimately enacted as Section 212(b) of the 1982 Act, 43 U.S.C. § 390*ll*(b) (1982)), was all that was required to clarify Interior's water marketing authority at Corps reservoirs:

> [Section 212(b)] define[s] and preserve[s] the repayment requirements intended by Congress for irrigation storage at Corps' projects. No additional definitions or provisions for such requirements are, therefore, necessary and might only serve to foster further confusion.
>
> *The Department of the Interior has informed us that it is continuing its efforts to identify customers for water stored for irrigation purposes at Corps' projects* and will be expanding its marketing of such water as demand develops . . . . *No legislative enactment is, therefore, necessary or advisable to expedite this effort.*

128 Cong. Rec. 16614 (1982) (emphasis added).

[12] Respondents argue that, if Interior were deemed to have marketing authority over the irrigation storage, this would subvert Congress' intention that such marketing should occur only where the Corps determines that (under Section 6) existing lawful uses of the water would not be adversely affected. Respondents point out that, under Section 9 and the reclamation laws, Interior need only decide that the marketing will not impair a reservoir's irrigation uses. Respondents' argument ignores the fact that the Corps and Interior have already *jointly* determined that the water could be made available for industrial use. J.A. 136. More importantly, the ETSI contract expressly states that it was entered into only after the Secretary had consulted with the Secretary of the Army and concluded that the contract would not adversely affect existing uses of water. J.A. 226.

the approval of Congress and the Corps to construct "additional works . . . for irrigation." Ry Br. at 18-19; States Br. at 22-29. But the language, history, and purpose of Section 8 all make clear that it was not intended to apply to the projects already approved by the Corps and the Congress through Section 9. After detailed study and analysis by Interior, the Sloan Report proposed the construction of Oahe with storage for irrigation; in S. Doc. No. 247, the Corps agreed to that plan. Thereafter, Congress approved the plan in Section 9(c) and in Sections 9(d) and 9(e) authorized appropriations for "the works to be undertaken under said plan by the Secretary of the Interior."

If Section 8's requirements applied to Oahe, as respondents contend, these authorizations and approvals in Section 9 would be for naught; they would all have to be repeated before the Secretary could exercise his Section 9 authority. Congress cannot have intended such a result. Rather, the only reasonable construction of the statute is that the approvals and authorizations in Section 9 meet the otherwise redundant requirements of Section 8. This construction is confirmed by both the language and the legislative history of Section 8.

As passed by Congress in 1944, Section 8 applies "[*h*]*ereafter*, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes . . . ." Despite respondents' contrary claims, the word "hereafter" underscores that Section 8 applies only to Corps projects for which an irrigation function is subsequently authorized, and not to projects for which the 1944 Act itself authorized such a function. This meaning is clear from reference to other sections in the statute: "hereafter" in Section 8 contrasts with "not heretofore or herein" found in Section 1. Indeed, Section 1(b) originally referred to works "hereafter" as well as "herein authorized for construction." The word "hereafter" was deleted "so that it

would apply only to projects which are authorized in the bill." 90 Cong. Rec. 8670 (1944) (statement of Senator O'Mahoney); *see also id.* at 8555-56. By implication, therefore, Section 8 applies to projects *not* authorized in the bill.[13]

The legislative history likewise confirms that Section 9 was intended to replace Section 8 at the multiple-purpose projects authorized in the Pick-Sloan Plan. Section 9 was inserted *after* Section 8 was complete.[14] Thus, knowing all the terms of Section 8, Congress expressly formulated Section 9—incorporating and fulfilling the purposes of Section 8—to cover the Missouri Basin projects only. This action demonstrates that Congress meant for Interior to proceed directly under Section 9 with the Missouri Basin projects described therein, without delaying his actions to comply with the repetitious dictates of Section 8.

III. Section 9 of the Flood Control Act and the Pick-Sloan Documents Incorporated Therein Gave Interior the Authority to Approve the ETSI Contract.

Section 9 is the only provision of the Flood Control Act that expressly and exclusively addresses Missouri Basin development. Respondents accuse ETSI of ignoring its "plain language" and elevating the Pick-Sloan Plan approved therein "to the level of enacted law." Ry

---

[13] By contrast, Section 6, which otherwise grammatically resembles Section 8, lacks the word "hereafter," implying that the authorization in that section applies to Corps projects generally. While respondents cite Section 7 to cast doubt on this interpretation, Ry Br. at 30 n.31, the utter dissimilarity of the two sections renders a comparison meaningless.

[14] When the earlier versions of Section 8 were being considered, the Missouri Basin projects were listed in Section 10, along with all of the other projects authorized in the 1944 Act. *See, e.g.*, 90 Cong. Rec. 4205-06 (1944). Eight days after S. Doc. No. 247, which reconciled the Pick and Sloan Reports, was presented to the Senate, *with Section 8 already in its final form, see* 90 Cong. Rec. 8674-76 (1944), the Missouri Basin projects alone were deleted from the scores of other projects in Section 10 and put in a new Section 9, *id.* at 8676; *see also id.* at 9279.

Br. at 14, 21-28; States Br. at 29-34. The "plain language" ETSI is accused of ignoring is the undefined term "reclamation . . . developments to be undertaken by the Secretary" used in Section 9(c), which the Railway asserts can only mean irrigation works constructed and maintained by Interior, Ry Br. at 24-25, and which the States imply can only mean a reservoir controlled by Interior, States Br. at 32. While respondents thus differ concerning the meaning of this "plain language", they agree that it precludes Interior from exercising authority at Oahe. Yet once again, nothing in the language of the statute or its history supports their position.

The first difficulty with respondents' argument is created by the plain language of Section 9 they choose to overlook. Section 9(a) begins by approving the House and Senate Documents that comprise the Pick-Sloan Plan. Section 9(c) further emphasizes the importance of those documents by providing that, "[s]ubject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and repayments by water users, *made in said House and Senate documents*, the reclamation . . . developments to be undertaken by the Secretary of the Interior *under said plans* shall be governed by the Federal Reclamation laws . . . ." (Emphasis added). Thus, if Section 9 communicates anything plainly, it is that the Secretary should look first to the "comprehensive plans" adopted in Section 9(a) to determine the scope of his authority and responsibility.[15] And,

---

[15] Contrary to respondents' assertions, *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153 (1953), fully supports this conclusion. *Chapman* makes clear that, while Congressional approval of a comprehensive plan for water resource development does not require the government to carry out every project precisely as described in the plan, the basic elements and policies of the plan are binding law. Here, the Secretary based his approval of the ETSI contract not on the fine details of the Pick-Sloan Plan but rather on the basic policies reflected therein and on the clearly stated project purposes. *See* ETSI Br. at 9-19. Nothing in *Chapman* supports respondents' claim that these elements of a plan approved by Congress may be ignored.

as ETSI has previously stressed, a fundamental policy of the comprehensive plans for Missouri Basin development is that "[a]ll irrigation features should be operated by the Bureau of Reclamation . . ." [16] and that "[i]n all reservoirs . . . utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior." [17]

In light of this clear policy in the Pick-Sloan Plan, the Secretary had to determine whether the irrigation storage at Oahe was part of a "reclamation . . . development to be undertaken by the Secretary" in accordance with the reclamation laws. Contrary to respondents' claims, nothing in this language implies that the reclamation laws govern only *after* the construction of "works" is complete and a reclamation project fully operational. The most sensible reading of the language—and the one the Secretary adopted—is that the reclamation laws apply to all phases of the Secretary's assigned development projects, from conception to final repayment of the costs.[18]

---

[16] The Railway contends that "features," like "developments," must mean "particular concrete works." Ry Br. at 24. A like argument was made and rejected in *Trinity County Public Utilities* v. *Harrington*, 781 F.2d 163 (9th Cir. 1986), where the court considered the applicability of the reclamation laws to a federal hydroelectric power project. The court held that not only actual dams but also power imported into the project area constituted "features" of that project for purposes of determining the rates that could be charged certain preference customers. Clearly, hydroelectric power can no more readily be deemed "concrete works" than the irrigation storage at issue in this case.

[17] S. Doc. No. 191, at 11, 8 (ETSI App. 68a, 63a); *accord* H.R. Doc. No. 475 at 3-4 (ETSI App. 7a-8a); *see also* S. Doc. No. 247 at 2 (ETSI App. 94a).

[18] Consistent with this interpretation of Section 9, the reclamation laws specifically provide that repayment obligations for industrial water use accrue, not from the time irrigation works are completed, but "from the year in which water is first delivered for the use of the contracting party." 43 U.S.C. § 485h(c). While construction of the Oahe irrigation unit has been suspended, the construction costs already incurred for the irrigation storage, *see* 128

IV. The Reclamation Reform Act of 1982 Expressly Preserves Interior's Contracting Authority at Corps-Built Reservoirs.

With remarkable bravado, respondents characterize legislation passed in 1982 as "the legislative *coup de grace* to the petitioners' theory that the reclamation laws apply to Oahe." Ry Br. at 41-42; States Br. at 23-24. It is, more accurately, the *piece de resistance* of that theory.

Respondents rely in particular on Section 212(a) of the 1982 Act, which they say deprives Interior of *any* authority at Corps reservoirs unless the reservoir is expressly designated a reclamation project or includes "irrigation works." Ry Br. at 42. The section simply does not say that. Section 212(a) relates exclusively to "*lands* receiving benefits from Federal water resources projects constructed by the [Corps]." (Emphasis added). It was designed to free land irrigated through privately-built works at Corps reservoirs from the acreage restrictions of the reclamation laws. 43 U.S.C. § 390*ll*(a) (1982).[19] This case has nothing to do with such acreage restrictions or with "lands receiving benefits from Federal water resources projects."

Section 212(b), however, does concern this case and speaks directly to the question of Interior's contracting authority. Although respondents would like to ignore it, that section's provisions were expressly intended to preserve Interior's authority to contract for the use and repayment of irrigation storage at Corps-built reservoirs. Prior to passage, the section was the subject of intense scrutiny and debate because some Senators were concerned that it might undercut the future ability of In-

---

Cong. Rec. 16609 (1982) (Table I), await repayment pursuant to the reclamation laws. The ETSI contract was part of Interior's entirely legitimate effort to begin recouping those costs.

[19] *Compare* Section 212(a) of the 1982 Act *with* 41 Op. Att'y Gen. 377 (1958) *and United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). *See also* S. Rep. No. 373, 97th Cong., 2d Sess. 10 (1982).

terior to obtain repayment under the reclamation laws for the use of irrigation storage at Corps reservoirs. *See* ETSI Br. at 26-27. To meet those concerns, the Senate Committee "specifically amended the original version of S. 1867 to insure that the Secretary's authority to contract with water users in order to recover costs *is maintained.*" 128 Cong. Rec. 16612 (1982) (emphasis added).[20]

Respondents claim that Congress believed Section 212 (b) applied only to agricultural water users. *See* Ry Br. at 42 n.47. This is not credible for two reasons. The statute expressly reaches all "water users" who contract with Interior. Moreover, Congress was specifically informed that repayment under the reclamation laws for irrigation storage at particular Corps projects, including Oahe, was being obtained in part from industrial water users.[21] Respondents are thus clearly wrong in asserting that Congress denied Interior the authority to contract and obtain repayment for the costs of irrigation storage at Lake Oahe. Section 212(b) provides that "contracts with the Secretary" which require "water users" to "repay . . . costs of a Corps of Engineers project . . . allocated to . . . irrigation storage *shall remain in effect.*" (Emphasis added). It is hard to imagine a clearer refutation of respondents' position or a stronger affirmation of the ETSI contract.

V. The Secretary's Interpretation of Section 9 Is Entitled to Deference.

The foregoing discussion plainly shows that the Secretary was fully justified in entering into a water service

---

[20] The Corps and Interior likewise both advised Congress that they supported the adoption of Section 212(b) in order "to assure that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way." *Id.* at 16607; *see also id.* at 16609; ETSI Br. at 26-27.

[21] *See* 128 Cong. Rec. 16608-09 (1982) (inquiry from Senator Moynihan); *id.* at 16611 (response from Major General Heiberg of the Corps).

contract with ETSI pursuant to Section 9(c). Even if there were some room for doubt about the Secretary's interpretation, however, his interpretation is clearly a reasonable one and, thus, deserving of deference.

Respondents contend that the Secretary's construction of Section 9 deserves no deference because (1) Interior is not clearly empowered to administer the section; (2) Congress has plainly rejected Interior's interpretation through Sections 6 and 8; and (3) his interpretation has been unsure, inarticulate, inconsistent and challenged by Congress and Army. None of these contentions is true.

Respondents first contend that, unlike this Court's past deference cases where the statute "unequivocally empowers the agency offering the interpretation to administer the program in question," "the existence of that authority is precisely the question presented" here. Ry Br. at 45 n.50. Section 9, however, expressly directs the Secretary to undertake the "reclamation and power developments" described in the Pick-Sloan Plan in accordance with the federal reclamation laws.[22] Respondents may not agree with the Secretary's interpretation of Section 9's direction, but they cannot legitimately dispute his basic authority to construe (and administer) the section.[23]

---

[22] *Compare United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985), where the Court deferred to the Corps' determination that its authority over "navigable waters" included wetlands adjacent to such waters, noting that it concerned "a problem of defining the bounds of [the agency's] regulatory authority." 106 S. Ct. at 462.

[23] The District Court attached great significance to the fact that, for certain purposes, the agencies designate storage in the Missouri Basin and elsewhere as "multiple-use" storage and that there is no storage at Oahe exclusively designated for irrigation. The Court mused, "one wonders how the Interior Department is to control what cannot be identified." Pet. App. 64a. This illustrates the problems courts encounter when they fail to defer to the expertise of the agencies Congress designated to administer a program. As the Corps and Interior explained to Congress in 1975, their determination of the volume of irrigation water avail-

Respondents next claim that, in both Sections 6 and 8, Congress "definitively" and "decisively" rejected the Secretary's interpretation of his authority. Ry Br. at 43-44; States Br. at 40-41. As shown, however, Section 6 addresses only the Corps' jurisdiction over "surplus water" at Corps-built reservoirs. It is disingenuous to suggest that this provision unambiguously covers unused irrigation storage at Oahe,[24] let alone that it rejects Interior's jurisdiction over such water. Likewise, it cannot fairly be said that Section 8 clearly required the Secretary to redo what Section 9 had already done.

Significantly, when respondents finally turn to the Secretary's interpretation of Section 9, they do not address his interpretation directly; instead, they fault him, first, for acknowledging doubts about his Section 9 authority when he entered into the MOU. Ry Br. at 44 n.48; States Br. at 42. But it is precisely where a statute is ambiguous that deference is appropriate, and there can be no doubt that one of the reasons the two Secretaries entered into the MOU was because of the statute's ambiguity.[25]

---

able for interim industrial use began with the quantification of the expected uses authorized in the Pick-Sloan Plan. Total depletions were projected, including anticipated agricultural demand. Then, taking into account desirable stream flow levels, the Corps and Interior (working with the Missouri Basin States) determined that one million acre feet of irrigation water could be used for industrial use for a period of at least forty years. ETSI App. 114a-116a. The "joint storage" designation used in the day-to-day operation of reservoirs was entirely irrelevant to that analysis.

[24] As discussed, it was not until March 1986 that Army General Counsel *first* construed "surplus water" to include unused irrigation water. Prior to that time, the Corps' view had been that the Act is "ambiguous" and "water from the main stem reservoirs may not be marketed by the Secretary of the Army as 'surplus' water under Section 6 of the 1944 Act." J.A. 128, 135 n.*.

[25] The respective 1974 Opinions of the Interior Solicitor and the Acting Army General Counsel documented that the statute was not plain regarding the agencies' water marketing authority at the main stem reservoirs. J.A. 120-27, 128-35. Moreover, shortly after the two Secretaries signed the MOU, Army Secretary Calla-

Moreover, as shown above, even this ambiguity was resolved with the 1982 passage of Section 212(b).

Respondents then fault the Secretary's interpretation of his authority as being not "adequately articulated." Specifically, they claim that his decision to enter the ETSI contract was based solely on the 1974 Opinion of the Interior Solicitor, a "conclusory" opinion "clearly flawed" in that it did not discuss Sections 6 and 8. Ry Br. at 48; States Br. at 41-42. These points are not well taken. The ETSI contract and its accompanying staff memorandum rely on Section 9 of the 1944 Act and Section 9(c) of the 1939 Reclamation Act as authority for the contract. J.A. 212-17, 225-26.[26] The supporting memorandum discusses the MOU and the 1974 Solicitor's Opinion as well. The 1974 Opinion, in turn, examines the background, language, and legislative history of Section 9 and details the Solicitor's reasons for concluding that Interior has authority under the Act to market unused irrigation water at Corps-built reservoirs.[27] This discussion more than meets the requirement that the Secretary "explain the rationale" for his decision and pro-

---

way wrote to Interior Secretary Morton, stating: "My greatest concern is that the statutes relating to marketing the water for industrial purposes are unclear." J.A. 142. Nevertheless, the two Secretaries agreed that the most reasonable construction of the "unclear" statutes was that the Secretary of the Interior could market the unused irrigation water. J.A. 136.

[26] The ETSI contract expressly makes the findings required by these two statutory provisions and by the MOU. J.A. 226. Respondents apparently believe that Interior's action should be declared *per se* unreasonable for its failure to also discuss Sections 6 and 8. Respondents cite no authority, however, requiring an agency to address matters that it deems immaterial to its decision. It would be particularly unfair to fault the Secretary for failing to address Section 6, since the Corps' view at the time was that no authority lay under that section to market unused irrigation water.

[27] Both the supporting memorandum to the Secretary (J.A. 212-23) and the Solicitor's legal opinion (J.A. 120-27) are entitled to deference along with the Secretary's own final decision. *See Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980).

duce a record indicating the "path" by which he reached that decision.[28]

Respondents also contend that deference is not due because Interior's construction of Section 9 has been inconsistent. Ry Br. at 47-48.[29] In particular, they claim that previous positions taken by the Secretary, even as recently as 1975 and 1982, contradict the position he advances here. This is simply not true.[30] From his initial participation in the drafting of the Flood Control Act through his approval of the ETSI contract, the Secretary has never deviated from the view he takes here—that he has Section 9 authority to market unused irrigation water from the main stem reservoirs.[31] Further-

---

[28] *See Bowen* v. *American Hospital Ass'n*, 106 S. Ct. 2101, 2113 (1986) (Stevens, J.); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 286 (1974).

[29] Respondents contradict themselves by charging that little deference should be given to Interior on the basis of alleged inconsistencies while also urging the Court to accord near-dispositive weight to the March 1986 Army General Counsel Opinion—an opinion that reversed the Corps' long-held view that unused irrigation water could *not* be marketed under Section 6.

[30] The only one of the four instances cited by respondents that is not distinguished or refuted by their own brief (Ry Br. 47 n.54) is a 1946 declaration by a Bureau Assistant Chief Counsel that the provisions of Section 9(c) of the Flood Control Act refer "exclusively to power developments undertaken by the Secretary of the Interior at dams he has been authorized to construct." This reference like others from the 1957 Hearings, pertained to *power* developments and Section 5, rather than to *reclamation* developments to which Section 5 is not applicable. In any event, a single 1946 view of an assistant counsel on a tangential point pales against the long-standing repeated position of the Secretary himself on the precise question now before the Court.

[31] It is particularly misleading for respondents to suggest that Interior's adoption of the MOU is inconsistent with his approval of the ETSI contract. In fact, his position in the MOU *supports* the position he takes here. In 1974, the Interior Solicitor determined that the Secretary is "clearly authorized" by Section 9 of the 1944 Act and Section 9(c) of the Reclamation Act "to make . . .

more, contrary to respondents' suggestions, the Secretary's interpretation has been specifically presented to and affirmed by Congress.[32] Finally, and perhaps most importantly, the Secretary's construction of the Act is a reasonable one that furthers the policies of the Act. For all these reasons, his construction should be affirmed by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
BARBARA L. SLOAN
HOGAN & HARTSON
(a partnership including
professional corporations)
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6544
Counsel for Petitioner
ETSI Pipeline Project

* Counsel of Record

---

contracts" for the municipal and industrial use of water. J.A. 126. The MOU thereafter confirmed this view, stating that the "Secretary of Interior may, pursuant to applicable authorities, both *on his own behalf* and as agent for the Secretary of the Army, contract for the marketing of water for industrial uses . . . ." J.A. 136 (emphasis added).

[32] The fact that Congress knew the Secretary's interpretation and failed to change the law strongly supports the reasonableness of that interpretation. *See United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. at 464-65; *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979). Indeed, the validity of the Secretary's view is further underscored by Congress' clear endorsement of that view in Section 212(b). *See Lawrence County* v. *Ladd Deadwood School District No. 40-1*, 469 U.S. 256, 267-268 (1985).

Nos. 86-939 and 86-941

Supreme Court, U.S.
FILED
OCT 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ETSI PIPELINE PROJECT, PETITIONER

v.

STATE OF MISSOURI, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RALPH W. TARR
Solicitor
Department of the Interior
Washington, D.C. 20240

SUSAN J. CRAWFORD
General Counsel
Department of the Army
Washington, D.C. 20310

TABLE OF CONTENTS

	Page
Argument	1
1. Section 9 of the Flood Control Act authorizes the Secretary of the Interior to enter into contracts to supply unutilized irrigation water for industrial use	2
a. Section 9(a)	3
b. Section 9(c)	4
c. Irrigation storage at Lake Oahe	6
2. Sections 6 and 8 of the Flood Control Act do not override the Secretary's authority under Section 9	7
a. The evolution of the Flood Control Act	7
b. Section 6	10
c. Section 8	11
3. The Reclamation Reform Act of 1982 does not limit the Secretary's authority under Section 9	13
4. The Secretary's interpretation is entitled to deference	14
5. The Secretary's interpretation promotes Congress's basic objective of a fair and efficient utilization of the Missouri River Basin's resources	17
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	17
Japan Whaling Ass'n v. *American Cetacean Society*, No. 85-954 (June 30, 1986)	14
United States ex rel. Chapman v. *FPC*, 345 U.S. 153 (1953)	3, 4

Page

Statutes:

Flood Control Act of 1944, ch. 665, 58 Stat. 887:
§ 5, 58 Stat. 890 15
§ 6, 58 Stat. 890 ..... 1, 7, 9, 10, 11
§ 8, 58 Stat. 891 ..... 1, 7, 9, 10, 11, 12, 13
§ 9, 58 Stat. 891 ..... *passim*
§ 9(a), 58 Stat. 891 ..... 2, 3, 4, 5, 11, 15
§ 9(c), 58 Stat. 891 ..... 2, 3, 4, 5, 15, 16
§ 9(e), 58 Stat. 891 11

Reclamation Project Act of 1939, § 9(c), 43 U.S.C. 485h(c) 3, 5

Reclamation Reform Act of 1982, 43 U.S.C. 390aa *et seq.*:
§ 212, 43 U.S.C. 390*ll* 13
§ 212(a), 43 U.S.C. 390*ll*(a) 13
§ 212(b), 43 U.S.C. 390*ll*(b) 13, 14

43 U.S.C. 392a 15

Miscellaneous:

90 Cong. Rec. 8553 (1944) 9

128 Cong. Rec. (1982):
p. 16605 13
p. 16607 14
p. 16611 14
p. 16612 13
p. 16614 14

Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. (1944) 8, 12

H.R. 4485, 78th Cong., 2d Sess. (1944) 7, 8, 9, 12

H.R. Doc. 475, 78th Cong., 2d Sess. (1944) 2, 3, 4, 11

H.R. Rep. 1309, 78th Cong., 2d Sess. (1944) 7, 8

Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works, 85th Cong., 1st Sess. Pt. 1 (1957) 15, 16

Miscellaneous—Continued: Page

S. Doc. 191, 78th Cong., 2d Sess. (1944) . . . 2, 3, 4, 12, 18
S. Doc. 247, 78th Cong., 2d Sess. (1944) 2, 3, 4, 7, 8-9
S. Rep. 97-373, 97th Cong., 2d Sess. (1984) 13
The World Almanac and Book of Facts (1987) 18

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-939

ETSI PIPELINE PROJECT, PETITIONER

v.

STATE OF MISSOURI, ET AL.

No. 86-941

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

ARGUMENT

In our opening brief, we explained that Section 9 of the Flood Control Act of 1944 (58 Stat. 891) authorizes the Secretary of the Interior to enter into contracts, pursuant to the federal reclamation laws, to supply unutilized irrigation water from the Missouri River's mainstem reservoirs for industrial use. Respondents offer scant challenge to our straightforward construction of Section 9. Instead, they argue that two general provisions of the 1944 omnibus flood control legislation, Sections 6 and 8 (58 Stat. 890, 891), override Section 9 and the specific functional division of authority set forth in the Pick-Sloan Plan. As we show below, respondents' basic premise is fundamentally wrong. Sections 6, 8, and 9 are fully consistent with each other

and with the Pick-Sloan Plan's express division of authority. And as we further demonstrate, respondents' other arguments are equally insubstantial. Our position is plainly reasonable and entitled to judicial respect.

1. *Section 9 of the Flood Control Act authorizes the Secretary of the Interior to enter into contracts to supply unutilized irrigation water for industrial use.* Respondents' arguments travel far afield from the relevant statutory provisions in this case. We therefore begin by resummarizing our basic position. As we explained in our opening brief (at 2-13), Section 9 of the Flood Control Act approved the Pick-Sloan Plan, a comprehensive program, jointly administered by the Army and the Interior Department for the development of the Missouri River Basin's water resources. That Plan, which represents a compromise between the interests of the arid and semi-arid upper basin states and the more humid lower basin states, consists of three congressional documents: (1) the Pick Plan, H.R. Doc. 475, 78th Cong., 2d Sess. (1944), a flood control proposal prepared by the Army Corps of Engineers; (2) the Sloan Plan, S. Doc. 191, 78th Cong., 2d Sess. (1944), a reclamation proposal prepared by the Interior Department's Bureau of Reclamation; and (3) the Corps-Bureau report, S. Doc. 247, 78th Cong., 2d Sess. (1944), a jointly prepared document that coordinates the Army and Interior plans. These three documents collectively provide the general framework for interagency development of the Missouri River Basin's water resources, including Lake Oahe, the mainstem reservoir involved here. See U.S. Br. 2-13.

The question in this case is whether the Secretary of the Interior may supply ETSI Pipeline Project with water from Lake Oahe that is presently impounded but not needed for irrigation purposes. As we explained in our opening brief (at 23-34), Section 9 grants the Secretary that power. Section 9(a) approves the Pick-Sloan Plan, which in turn gives the Secretary of the Interior explicit authority to manage the reclamation aspects of the mainstem reservoirs.[1] Section 9(c) then identifies the body

[1] For example, the Corps' Pick Plan expressly provides that "utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in

of law—federal reclamation law—that governs *how* the Secretary shall exercise his authority.[2] The Secretary may therefore supply unutilized irrigation water from Lake Oahe in accordance with provisions of the Reclamation Project Act of 1939, a federal reclamation law that permits the Secretary to provide unneeded irrigation water for miscellaneous purposes. See 43 U.S.C. 485h(c).

a. *Section 9(a).* Respondents do not dispute that Section 9(a) approved the Pick-Sloan Plan, that Congress envisioned joint Army-Interior administration of the Plan, or that the three referenced documents comprising the Plan specify that the Secretary of the Interior shall have responsibility for the utilization of irrigation storage at Missouri River mainstem reservoirs. They suggest, instead, that the congressionally approved documents do not provide a reliable guide to congressional intent (Mo. Br. 24-25, 33; KCS Ry. Br. 14-15, 22-23). Respondents treat the Pick Plan, the Sloan Plan, and the Corps-Bureau coordinating document as mere "legislative history" (Mo. Br. 33) or "agency comments" (KCS Ry. Br. 14). But plainly, these documents, which collectively constitute a *congressionally approved plan,* are entitled to much greater weight. They establish, in this Court's words, the "basic policy for the systematic development of a river basin" (*United States ex rel. Chapman* v. *FPC*, 345 U.S. 153, 163 (1953)). In particular, they set forth the basic functional division of authority that Congress determined shall govern the Pick-Sloan Plan. Respondents, at bottom, urge that this Court ignore the most relevant and

---

accordance with regulations prescribed by the Secretary of the Interior" (H.R. Doc. 475, *supra,* at 4). The Bureau's Sloan Plan concurs in this division of authority (S. Doc. 191, *supra,* at 3-4, 7-8), further specifying that mainstem reservoirs "should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned" (*id.* at 11). And the Corps-Bureau coordinating document makes this functional division possible by providing that the mainstem reservoirs would be built with sufficient capacity to accommodate the Corps' flood control and navigation objectives and the Bureau's reclamation water needs (S. Doc. 247, *supra,* at 1, 11-12). See U.S. Br. 24-29.

[2] Section 9(c) provides that "reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891). See U.S. Br. 29-34.

specific indicia of congressional intent on the precise question at issue here. See U.S. Br. 24 & n.39.[3]

b. *Section 9(c).* Respondents simply fail to come to grips with the Secretary of the Interior's interpretation of Section 9(c). As we explained in our opening brief (at 29-34), Section 9(c)'s instruction that the "reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891), was added to ensure that the Secretary would exercise his responsibilities under the Pick-Sloan Plan in accordance with established reclamation principles. Respondents, however, simply adhere to the court of appeals' conclusion that when Congress used the term "reclamation * * * developments" it referred to physical irrigation works rather than the Secretary's reclamation activities under the Pick-Sloan Plan. See Mo. Br. 29-31; KCS Ry. Br. 26-28. We have discussed in our opening

---

[3] Respondents err in contending that we would read Section 9(a) as "incorporat[ing] in full all the language of those documents" (KCS Ry. Br. 22). We stated the role of congressionally approved plans quite clearly in our opening brief: "When Congress approves a proposed plan for such projects, it adopts the basic policy for the systematic development of the river basin set forth in the accompanying reports" (U.S. Br. 24 n.39, citing *Chapman*). This approach leaves the operational details to the discretion of each agency pursuant to its authority under the Flood Control Act and other laws. Respondents acknowledge *Chapman*, but then suggest that the functional division of authority set forth in the Pick-Sloan Plan need not be respected because it is not " 'an integral part of the plan' [345 U.S. at 160]" (Mo. Br. 25 n.30; KCS Ry. Br. 23 n.21). That contention has no merit. The inter-agency division of authority was discussed at length in all three reports (H.R. Doc. 475, *supra*, at 1-9; S. Doc. 191, *supra*, at 1-11; S. Doc. 247, *supra*, at 1-6) and was one of the most important questions raised and resolved in the Pick-Sloan Plan. Respondents' contention that the Pick-Sloan Plan "is silent on industrial use by Interior" (KCS Ry. Br. 23 n.21) is incorrect; the Sloan Plan specifically observed that "[i]n the future there will also be greater requirement for industrial water supplies" (S. Doc. 191, *supra*, at 13) and that "[t]o the extent the uses of water are competitive, the use of water for domestic, agricultural, and industrial purposes should have preference" (*id.* at 10). The other documents also recognized the possibility that stored waters could be applied to industrial use (*e.g.*, H.R. Doc. 475, *supra*, at 7 (Bureau comments)) or "other purposes" (S. Doc. 247, *supra*, at 2, 3). See also U.S. Br. 35-37 & nn.54-55.

brief (at 31-34) why that interpretation is untenable.[4] We further observe here that respondents' construction of Section 9(c) cannot be squared with the provision's syntax. Section 9(c) is worded as a guide to the Secretary's exercise of his powers under the Pick-Sloan Plan; it is not phrased as a grant of authority over physical works. Indeed, if Section 9(c) were written as respondents would have it, the statute would provide that federal reclamation law governs *physical irrigation works* rather than the Secretary's *actions*. The reclamation laws, however, describe the Secretary's authority; they do not, stricly speaking, "govern" physical irrigation works.[5] Thus, it is far more sensible to interpret Section 9(c)'s reference to "reclamation developments" as comprehending all of the Secretary's reclamation activities rather than just dams, pumping stations, or other physical products utilized in those activities.[6]

---

[4] As we explained, Congress enacted Section 9(c) to make clear that the Secretary of the Interior's reclamation activities, although approved in a flood control Act, would nevertheless be governed by federal reclamation law (U.S. Br. 30-31). As we further explained, the court of appeals' and respondents' interpretation of Section 9—that it "simply adopts the projects proposed in the Pick-Sloan plan and directs that the reclamation laws apply to those undertaken by the Secretary of the Interior" (Pet. App. 23a-24a)—is inconsistent with the plain language of Section 9(a) which approves the "general comprehensive plans" (58 Stat. 891) and not merely the discrete projects contained therein (U.S. Br. 31-32). Those plans specify that the Secretary of the Interior shall administer the reclamation aspects of the program; they do not limit the Secretary's authority to those physical works that the Bureau of Reclamation has constructed (*id.* at 32). There is simply no reason to believe that Congress enacted Section 9(c) to override a flexible inter-agency plan for cooperation and effectively prevent the Secretary from administering reclamation aspects of Army-constructed facilities. See U.S. Br. 32. Indeed, when Congress wished to describe physical irrigation works in Section 9's other subsections, it specifically used the word "works" (U.S. Br. 33 n.50). And as we further explained, respondents' interpretation would discourage optimal utilization of the stored waters (*id.* at 36-38). Respondents essentially ignore all of these points.

[5] For example, the particular reclamation law at issue here, Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), states that "[t]he Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes" provided that he satisfies certain requirements. This Section, like virtually every other section of the Reclamation Project Act, addresses how the Secretary should exercise his reclamation responsibilities.

[6] Respondents err in arguing that we treat the ETSI contract as a "reclamation development" (Mo. Br. 30; KCS Ry. Br. 26). As our opening brief

c. *Irrigation storage at Lake Oahe.* Finally, in disputing our construction of Section 9, respondents contend that the Pick-Sloan Plan's specification that the Secretary of the Interior shall administer water stored for irrigation purposes does not control here because Lake Oahe does not have any irrigation storage (Mo. Br. 31-32; KCS Ry. Br. 24-25). Respondents are quite plainly wrong. As we explained in our opening brief (at 11-12, 15 n.29, 37, 41 n.62), Lake Oahe was jointly designed by the Army Corps of Engineers and Interior's Bureau of Reclamation to satisfy the needs of both agencies. The final storage capacity of 23.34 million acre feet was specifically selected over the Corps' suggested capacity of 6 million acre-feet to provide, among other uses, for irrigation of 750,000 acres of cropland in the James River Basin (*ibid.*). As a result of postponement or abandonment of proposed (and partially completed) irrigation projects, the projected irrigation needs have not yet materialized (*ibid.*). Interior and the Army have therefore jointly concluded that a portion of the water intended, but not needed, for irrigation is available for other use (*id.* at 16 n.30; see also J.A. 136, 140). Thus, respondents' suggestion that there is no unutilized irrigation storage is without basis.[7]

---

explicitly stated, the "reclamation developments" at issue here are the Secretary's *activities* in making irrigation water stored at the mainstem reservoirs usable or available: "Thus, when the Secretary defines the irrigation storage needs at mainstem reservoirs, determines the proper disposition of the resulting impounded water, or enters into contracts to make that water available for a recognized reclamation use * * *, he is engaged in a reclamation development." U.S. Br. 33 (footnote omitted).

[7] Respondents argue (Mo. Br. 31) that there is no irrigation storage at Lake Oahe because the Corps defines four general categories of storage (exclusive flood control, annual flood control and multiple use, carry-over multiple use, and inactive) and includes irrigation water under one of its four general storage categories. As we explained in our opening brief (at 41-42 n.62), the Corps definitions, which are created for independent operating purposes, have no relevance to the availability of unutilized irrigation water: "Plainly, Interior does not lose its authority over water available for irrigation simply because the Army classifies it, for operational purposes, as part of the water available for multiple purposes" (*ibid.*). Respondents further suggest (KCS Ry. Br. 25) that Congress itself must expressly "reserve" water for irrigation. However, nothing in the Flood Control Act requires Congress to take such action; Congress, through its approval of the Pick-Sloan Plan has given Interior authority

2. *Sections 6 and 8 of the Flood Control Act do not override the Secretary's authority under Section 9.* Respondents' principal contention is that Sections 6 and 8 of the Flood Control Act impliedly prohibit the Secretary of the Interior from providing unutilized irrigation water from mainstem reservoirs for industrial use. See Mo. Br. 18, 22; KCS Ry. Br. 16, 18, 28, 32. Their arguments rest, however, on a basic misunderstanding of the origin and interrelationship of the Flood Control Act's provisions. In particular, respondents fail to distinguish between the Flood Control Act's general provisions, such as Sections 6 and 8, which apply to all Army flood control projects, and Section 9's specific authorization of a joint Army-Interior program for the Missouri River Basin. We therefore briefly review the evolution of that legislation, with particular emphasis on the relationship between Sections 6, 8, and 9.

a. *The evolution of the Flood Control Act.* The Flood Control Act of 1944 began as a House omnibus flood control bill (H.R. 4485, 78th Cong., 2d Sess.) to expand the Army Corps of Engineers' national flood control program to more than 50 locations scattered throughout the nation. When the bill emerged from the House Committee on Flood Control, it included provisions giving the Secretary of the Army general authority to construct recreational facilities (§ 3), sell surplus water (§ 4), and regulate flood control and navigation storage (§ 5) for Army flood control projects, including the 56 proposed projects listed near the end of the bill. See H.R. Rep. 1309, 78th Cong., 2d Sess. 6-8, 52-53 (1944). The bill further provided that if the Army determined at some future date that any of the flood control projects could be used for reclamation purposes, the Secretary of the Interior would prescribe regulations for the use of the available storage space (§ 6). See H.R. Rep. 1309, *supra*, at 8, 53.

---

to determine the amount of water needed and available for irrigation use. See, *e.g.*, S. Doc. 247, *supra*, at 1 ("The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.").

The Corps' Pick Plan was one of the 56 projects included in the bill's authorization list (H.R. Rep. 1309, *supra*, at 23-25). See U.S. Br. 4-6. One month after the House committee issued its report, the Interior Department's Bureau of Reclamation published its Sloan Plan. The House debated H.R. 4485 and passed it in essentially the same form proposed by the House committee, following repeated suggestions that the Corps' Pick Plan should be coordinated with the Bureau's Sloan Plan. See U.S. Br. 6-9.

The House's omnibus flood control bill was next submitted to the pertinent Senate subcommittee, where Secretary of the Interior Ickes appeared and proposed amendments to Sections 4 and 6.[8] On June 22, 1944, the Senate subcommittee issued a report that recommended passage of an amended omnibus bill that did not include Secretary Ickes' suggested changes to Section 4 (which was now numbered Section 6) but did include his suggested changes to Section 6 (now numbered Section 8). See U.S. Br. 9-11 & nn. 15, 17. Meanwhile, the Corps and the Bureau worked on the much narrower problem, limited to the Missouri River Basin, of reconciling the Pick and Sloan plans. They ultimately issued their joint report concluding that their respective plans could be coordinated if the agencies exercised shared responsibility – based on each agency's statutory mission and practical expertise – in design as well as administration at each of the multiple purpose mainstem reservoirs. See S. Doc.

---

[8] See *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. (1944) [hereinafter *H.R. 4485 Senate Hearings*]. Secretary Ickes proposed that Section 4, which permitted the Army to sell surplus water from Corps flood control projects, be amended to provide that "Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pursuant to section 6 of this Act" (*id.* at 311-313). This amendment would have had the practical effect of giving the Bureau of Reclamation *exclusive* control over surplus water at all Corps reservoirs that are utilized for irrigation purposes (see *id.* at 457-458). Secretary Ickes also suggested that the language of Section 6 be modified to conform with "various technical features of the Federal reclamation laws" (*id.* at 313) including the fact that those laws "are largely designed to authorize a system of contractual relationships" (*id.* at 458).

247, *supra*, at 1. This approach led to the comprehensive joint plan for six mainstem reservoirs that would each serve "the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses" (*id.* at 3). See U.S. Br. 11-12.

Shortly thereafter, the Senate debated H.R. 4485. It adopted, with slight modifications, the Senate subcommittee's versions of Sections 6 and 8. Having resolved these general issues, the Senate then addressed the specific question of coordinating the Army's and the Interior Department's interests in the Missouri River Basin. It removed the Corps' Missouri River Basin project from the general list of Army flood control projects and created an entirely new provision—Section 9—that authorized the Pick Plan and the Sloan Plan, as coordinated by the Corps-Bureau joint report. See 90 Cong. Rec. 8553 (1944). Following a House-Senate conference, Congress passed the Senate version of H.R. 4485, including Section 9, thus approving the Pick-Sloan Plan. See U.S. Br. 12-14.

As this description shows, Sections 6, 8, and 9 serve quite distinct functions. Sections 6 and 8 are non-specific provisions of an omnibus flood control Act that guide the Army's general administration of its vast array of flood control projects.[9] Section 6 gives the Army general authority to supply "surplus water" from Army reservoirs, and Section 8 permits the Army to make future assignments of Army reservoirs for reclamation use. Section 9, by contrast, approves a specific, comprehensive and unique inter-agency plan—set forth in the Pick Plan, the Sloan Plan, and the Corps-Bureau joint report—for design, construction, and administration in the development of the Missouri River Basin's water resources. That plan envisions that the Army shall administer the flood control aspects of the program in accordance with its empowering statutes, including Sections 6 and 8, and that Interior shall administer the reclamation aspects of that program in accordance with federal reclamation

---

[9] Respondents give the misleading impression that the Flood Control Act of 1944 was concerned strictly with the Missouri River Basin. See, *e.g.*, KCS Ry. Br. 13 ("Congress enacted the Flood Control Act of 1944 in a careful effort to provide for wise conservation and development of the water resources of the Missouri River Basin."); see also *id.* at 16-17.

law. Contrary to respondents' contentions, there is simply no conflict, under our interpretation of the Flood Control Act, among Sections 6, 8, and 9.

b. *Section 6.* Respondents attempt to create a conflict by characterizing Section 6 as giving the Army *exclusive* authority to supply water from the Missouri River mainstem reservoirs for industrial use.[10] That attempt founders on the plain language of the statute. Section 6, which provides that the "Secretary of War is authorized to make contracts * * * for domestic and industrial uses for surplus water" (58 Stat. 890) gives the Army unquestioned power over "surplus water" at Army-operated reservoirs, but it does not provide that the Army's power is exclusive. Nothing in the legislative history suggests that the Army's general authority to supply "surplus water" overrides Interior's specific authority, under the Pick-Sloan Plan, to administer the waters stored for irrigation purposes at the Missouri River mainstem reservoirs.[11]

---

[10] Contrary to respondents' present reliance on the Army's authority, they have previously asserted that the Secretary of the Army has no authority to provide Lake Oahe water for industrial use because "the waters to be committed from the Oahe reservoir are not 'surplus,' and their diversion from Oahe would adversely affect navigation, hydropower operation, specifically authorized project purposes, and other existing lawful uses of water" (KCS Ry. Third Amended Complaint para. 101; see also Mo. Amended Complaint para. 85). The Army has since concluded that the Missouri River reservoirs may indeed contain "surplus water" (U.S. Br. 38 n.58). There is no reason to believe that respondents would be satisfied if the Army, rather than Interior, provided ETSI with water for its industrial use.

[11] Indeed, the House debate suggests that Army's authority would not be exclusive. See U.S. Br. 8 n.11, 25-26 nn.42-43. Respondents contend that the Army's authority must be exclusive because the Senate subcommittee rejected Secretary Ickes' suggested amendment of Section 4 of the House bill (see note 8, *supra*), which would have given Interior *exclusive* authority to supply surplus water from *all* Army dams serving irrigation functions. See Mo. Br. 19-20; KCS Ry. 37-38. This argument is logically infirm: Congress could refuse to give Interior exclusive authority at all Army reservoirs that serve irrigation functions, but nevertheless give Interior concurrent authority at the Missouri River mainstem reservoirs, which the Army and Interior jointly administer based on a functional division of authority. Indeed, Congress, through the enactment of Section 9 and the consequent approval of the Pick-Sloan Plan, did just that. Section 9 and the Pick-Sloan Plan envision that the

As we explained in our opening brief (at 24-25, 34-39), the Pick-Sloan Plan envisioned that the Army and Interior would concurrently exercise authority over the Pick-Sloan reservoirs and would respond flexibly to the Missouri River Basin's needs. The Army and the Interior Department can best administer these multiple purpose reservoirs if both agencies have authority to supply otherwise unutilized water to its best possible use. Those agencies have long agreed on the need for appropriate consultation with each other before providing water service from the mainstem reservoirs (J.A. 136-137, 140; see U.S. Br. 16 & n.32, 47 n.70) and interior did so in this case (*id.* at 18). They should be allowed to determine, through consultation and coordinated review, which agency is best suited to supply water in light of the functional division of authority and the particular circumstances presented. This approach assures that full consideration is given to the interests of *all* the Missouri River Basin's water users.

c. *Section 8.* Respondents' attempt to create a conflict between Sections 8 and 9 is equally unavailing. Section 8 provides that if the Secretary of the Army "hereafter" makes a determination that an Army-operated reservoir may be used for irrigation purposes, the Secretary of the Interior may construct, operate and maintain "additional works in connection therewith" provided that he first prepares a report and receives congressional authorization (58 Stat. 891). That provision, which specifies the procedure the Army and Interior must follow when *adding* irrigation works to Army reservoirs, has no direct bearing in this case. Congress, through its enactment of Section 9 and its approval of the Pick-Sloan Plan, authorized the construction of irrigation works at Lake Oahe.[12] Those partially completed

---

Army will exercise its authority in accordance with Section 6, while Interior will exercise its authority under the federal reclamation laws.

[12] Section 9(a) authorized the "initial stages" of the Pick-Sloan Plan, and Section 9(e) provided that "$200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior" (58 Stat. 891). That authorization process involved the same steps set forth in Section 8: the Army determined that its reservoirs could be used for reclamation purposes (H.R. Doc. 475, *supra*, at 3-4); the Secretary of the Interior prepared a report, in

works have now been either postponed or abandoned. See U.S. Br. 15 n.29. Neither the Army nor Interior is seeking to add "additional works" at Lake Oahe; instead, Interior is attempting to assure that Lake Oahe's preeminent existing reclamation feature—namely its massive irrigation storage capacity—is optimally applied to a permissible.reclamation use. Thus, Section 8 is simply not relevant here.[13]

---

accordance with the reclamation laws, describing the proposed development (S. Doc. 191, *supra*); and Congress, in Section 9, authorized the works (58 Stat. 891).

[13] Respondents contend Section 8 indicates that "the reclamation laws do not apply to Army-controlled reservoirs unless and until Interior completes additional works for irrigation purposes after Army approval" (KCS Ry. Br. 18 (capitalization omitted)). But that argument finds no support in Section 8's language or legislative history. There is no basis for respondents' supporting contention (Mo. Br. 25-27; KCS Ry. Br. 39-41) that Secretary Ickes' proposed amendment to Section 6 of the House bill (which later became Section 8 of the Flood Control Act) ceded away Interior's authority (under the subsequently formulated Section 9) to administer the reclamation features of the Pick-Sloan Plan. That amendment, which replaced language allowing Interior to "prescribe regulations for the use" of irrigation storage with language allowing Interior to "construct, operate, and maintain" additional irrigation works, did not signal some "radical" narrowing of Interior's authority at the mainstem reservoirs. As we have pointed out (note 8, *supra*; U.S. Br. 28 n.45), that change simply reflects the fact that Interior customarily does not prescribe regulations for the *use* of irrigation storage; rather it supplies stored water through water service contracts. As Secretary Ickes himself explained (*H.R. 4485 Senate Hearings* 458):

> That section as it now stands provides for the application of the Federal reclamation laws to the irrigation features of Army reservoir projects. However, it is not drafted in a way that ties in with the basic provisions of the reclamation laws in all pertinent respects. For example, it speaks of those laws as though they involved merely the imposition of regulations, whereas in truth they are largely designed to authorize a system of contractual relationships.

Thus, Secretary Ickes' amendment, which was proposed and adopted prior to the formulation and adoption of Section 9, was basically technical in nature and certainly was not intended to limit the Secretary's authority under the Pick-Sloan Plan. Respondents do not, and cannot explain why Congress or Secretary Ickes would have wanted Interior to complete construction of presently unneeded irrigation works before putting available irrigation water to a beneficial reclamation use.

3. *The Reclamation Reform Act of 1982 does not limit the Secretary's authority under Section 9.* Respondents travel still further afield in challenging the Secretary of the Interior's interpretation of Section 9. They contend that Section 212 of the Reclamation Reform Act of 1982, 43 U.S.C. 390*ll*, casts a pall over Interior's authority to enter into industrial marketing contracts for water stored in mainstem reservoirs (Mo. Br. 23-24; KCS Ry. Br. 41-42). This argument, too, founders upon plain language. Section 212(a) provides that reclamation law shall not "be applicable to *lands*" receiving benefits from Corps constructed facilities unless certain conditions are met (43 U.S.C. 390*ll*(a) (emphasis added)). That provision, whose primary purpose was to exempt certain land owners from the reclamation law's acreage limitations (S. Rep. 97-373, 97th Cong., 2d Sess. 10, 15-16 (1984)), has no application to this case, which does not involve the application of reclamation law to land.[14]

Indeed, Section 212(b), 43 U.S.C. 390*ll*(b), which preserves existing repayment requirements at Corps-constructed dams, including Lake Oahe, supports our contention that the water marketing provisions of the reclamation law remain in force at the Missouri River mainstem reserviors. That subsection was added "to insure that the Secretary's authority to contract with water users in order to recover costs is maintained" (128 Cong. Rec. 16612 (1982) (Sen. Wallop)). See also S. Rep. 97-373, *supra*, at 12, 16. As we explained in our opening brief (at 48 n.72), Congress requested comments from the Interior Department and the Army concerning Section 212's practical effect, and received material that "provides, in the most specific detail, the information about the projects that would be affected and those that would not" (128 Cong. Rec. 16605 (1982) (Sen. Moynihan)), including information concerning Interior's in-

---

[14] Respondents themselves interpret Section 212 as simply limiting the application of Section 8 of the Flood Control Act (see Mo. Br. 23-24; KCS Ry. Br. 41-42), a provision that we have already shown has no application to this case. The Senate Report expressly states, "The specific legislation dealing with the project in question must be consulted to determine the applicability of the reclamation law" (S. Rep. 97-373, *supra*, at 16). The "specific legislation" in this case would be, of course, Section 9 of the Flood Control Act.

dustrial water marketing program.[15] Thus, far from renouncing Interior's water marketing activities, Congress, by all indications, supported that program.

3. *The Secretary's interpretation is entitled to deference.* Respondents recognize that the courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed legislative intent (see, *e.g.*, *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11), but contend that the Secretary's interpretation of his authority under Section 9 is not entitled to deference here. See Mo. Br. 43-45; KCS Ry. Br. 43-49. They urge that the Secretary's interpretation is not consistent with the Act itself, or with the Interior Department's and the Army's past interpretation of the Act. These contentions are plainly and demonstrably wrong. Indeed, as we explained in our opening brief (at 44-50), the Secretary's interpretation is entitled to special deference in this case.

We have already shown that the Secretary's construction of the Flood Control Act is reasonable and, indeed, compelling. Respondents' suggestions that the Interior Department has taken inconsistent positions on Section 9 are demonstrably erroneous. Respondents rely almost exclusively (Mo. Br. 34 n.41;

---

[15] The Bureau stated that Section 212(b) would "assure that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way" (128 Cong. Rec. 16607 (1982) (letter from Comm'r Broadbent to Sen. Moynihan)). The Army further explained that Missouri River mainstem reservoir costs are allocated, in part, to irrigation and that a "portion of the mainstem storage space set aside for irrigation has been contracted for by industrial water users for interim water supplies" (*id.* at 16611 (letter from Gen. Heiberg to Sen. Moynihan)). See also *id.* at 16614 (letter from Dep. Ass't Sec. of the Army Dawson) (noting that Section 212(b) "preserved the repayment requirements intended by Congress for irrigation storage at Corps' projects," that Interior "is continuing its efforts to identify customers for water stored for irrigation purposes at Corps' projects" and that no legislative enactment is "necessary or advisable to expedite this effort"). Thus, respondents are plainly wrong in contending (KCS Ry. Br. 42 n.47) that Congress was not aware of the Interior Department's highly publicized water marketing program. The fact that the ETSI contract was not specifically mentioned (*ibid.*) – because it did not exist – does not gainsay our submission.

KCS Ry. Br. 47 n.54) on the Interior Department's 1957 congressional testimony and accompanying documents concerning Pick-Sloan Plan hydropower revenue and cost allocations.[16] But the 1957 testimony actually *supports* the Secretary's interpretation. The Interior Department, applying the same principles advocated here, explained that Section 9 and the Pick-Sloan Plan, rather than the Flood Control Act's general hydropower provision (§ 5, 58 Stat. 890), govern the hydropower allocations from the Missouri River mainstem reservoirs.[17] Indeed, as we explained in our opening brief

---

[16] See *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works*, 85th Cong., 1st Sess. Pt. 1 (1957) [hereinafter *1957 Senate Hearings*]. Respondents also cite (KCS Ry. Br. 47-48 n.54) a 1981 statement concerning Section 8 that on its face is neither inconsistent with our position nor relevant to this dispute.

[17] See *1957 Senate Hearings* 313-417 (testimony and supporting documents of Ass't Solicitor Weinberg). The Assistant Solicitor stated that "the key to the matter is to be found in an examination of the plans that were authorized and adopted by section 9" (*id.* at 314) and that Section 9(a) "must be read together with (9c)" (*id.* at 324). He agreed with Senator Case (who participated in the 1944 debates) that "Section 9(c) does not go to the physical structures only" (*id.* at 318), and later cited the functional division of authority set forth in the Pick-Sloan Plan (*id.* at 327-328). He further explained that "it was the conclusion of the Secretary that section 5 had no application" to hydropower cost allocations under the Pick-Sloan Plan (*id.* at 315), and that "we are consistent on the view that section 5 does not apply in the Missouri River Basin" (*id.* at 323). See generally *id.* at 344-353 (written statement).

Respondents, completely misreading the Assistant Solicitor's testimony, suggest that he advised Congress that the mainstem reservoirs were not "reclamation developments" for purposes of Section 9(c) (KCS Ry. Br. 47-48 n. 54). That Assistant Solicitor actually said something entirely different. He explained (*1957 Senate Hearings* 318-319) that Section 9 would govern the application of hydropower revenues, that Section 9(c) required that those receipts be deposited in accordance with the reclamation laws, and that the relevant reclamation law was the Hayden-O'Mahoney Amendment, which requires (with certain exceptions) that all moneys received from "irrigation projects * * * *constructed* by the Secretary * * * shall be covered into the reclamation fund" (43 U.S.C. 392a (emphasis added)). The Assistant Solicitor continued, "Since the Bureau of Reclamation or the Secretary of the Interior has not *constructed* Gavins Point Dam, Oahe Dam, or the other mainstem-dams, the Hayden-O'Mahoney amendment does not apply" (*1957 Senate Hearings* 319 (emphasis added)). He later explained that Interior would allocate certain

(at 42-44), the Interior Department's financial management practices have always recognized, and the power rates for the midwestern states have long reflected, the unique hybrid nature of the Pick-Sloan facilities.

Respondents' contention that the Secretary's construction "has been challenged consistently by the Army" (KCS Ry. Br. 45; see Mo. Br. 44) is simply incorrect. The Department of the Army has quite properly concluded that the Secretary of the Interior's interpretation of his authority is entitled to deference, provided that the determination does not interfere with the Army's responsibilities under the Pick-Sloan Plan. See U.S. Br. 46-47.[18] Plainly, the Army General Counsel, who has signed this brief, speaks on behalf of the Army. Respondents, in turn, have no authority to speak on its behalf.[19]

---

revenues to the reclamation fund on a proportionate basis reflecting the hybrid nature of those reservoirs (*id.* at 319, 341-342). Thus, it is quite clear that when the Assistant Solicitor indicated that the mainstem reservoirs were not "reclamation development *constructed* by the Secretary of the Interior" (*id.* at 319 (emphasis added)), he was discussing the application of the Hayden-O'Mahoney Amendment, and was not suggesting that the Secretary's activities at those reservoirs fell outside of the coverage of Section 9(c).

Respondents also state (Mo. Br. 34 n.41; KCS Ry. Br. 47-48 n.54) that the Secretary's present position is inconsistent with a 1950 Interior memorandum signed by Solicitor White (see *1957 Senate Hearings* 366). Respondents neglect to mention that Secretary of the Interior Chapman rejected Solicitor White's analysis at the time it was rendered (see *id.* at 337-338). As the Assistant Solicitor explained, "the law commits the matter to the Secretary, and this is the position that *the Secretary* took" (*id.* at 338 (emphasis added)). Respondents also cite a 1946 memorandum from a Bureau of Reclamation assistant chief counsel to a branch director (*id.* at 389). There is no evidence that the contemporaneous Secretary was even aware of this nonauthoritative internal memorandum.

[18] The Army has long followed the practice of giving deference to the Secretary of the Interior's interpretation of his authority. For example, Assistant Solicitor Weinberg observed in 1957 that the Army had not expressed a view on the treatment of irrigation cost allocations because "that is a matter in which the Army properly deferred to the Department of the Interior" (*1957 Senate Hearings* 315).

[19] Throughout this litigation, respondents have claimed to present the Army's views, relying on nonauthoritative documents, such as a one and one half page internal memorandum from a Corps assistant chief counsel (whom respondents incorrectly identify as an "Army Assistant General Counsel"). See Mo. Br. 44 n.50.

Finally, we note that respondents cannot dispute that the Flood Control Act of 1944 is written in unusually broad language that vests the responsible agencies with broad discretion, that the Interior Department was intimately involved in the creation of the legislation program and therefore has special insight into its proper interpretation, or that decision as to the meaning of the statute involves reconciling conflicting policies and requires more than ordinary knowledge of the subject matter. See U.S. Br. 45-46. This case thus presents precisely the situation contemplated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where an agency is entitled to deference.

5. *The Secretary's interpretation promotes Congress's basic objective of a fair and efficient utilization of the Missouri River Basin's resources.* Respondents' elaborate arguments simply ignore what lies at the very heart of this dispute. Congress approved the Pick-Sloan Plan to serve the needs of the entire Missouri River Basin by, among other objectives, providing the arid and semi-arid upper basin states with irrigation water while promoting commerce and protecting the lower basin states from seasonal floods. As the upper basin states explain (Amicus Brief for the States of Montana, North Dakota, South Dakota, and Wyoming), they have dedicated a vast expanse of productive lands for construction of the massive mainstem reservoirs that presently protect the more humid lower basin states from once devastating floods. They simply seek a reasonable benefit from their sacrifice—the opportunity to put a portion of those flood waters stored within their borders to a beneficial use.[20]

Respondents pay mere lip service to the *national* objectives that motivated approval of the Pick-Sloan Plan. See, *e.g.*,

---

[20] The ETSI contract involves a relatively small diversion. As the Corps of Engineers' Environment Assessment stated: "Total annual evaporation from Lake Oahe averages 909,000 [acre-feet] or 2,490 [acre-feet per day]. This is 17 times the ETSI depletion. Ten hot September days, at a rate of 5,600 [acre-feet per day] could evaporate a volume equivalent to the entire annual ETSI depletion volume" (C.A. App. 365).

S. Doc. 191, *supra*, at 10.[21] Their legal objections reflect, at bottom, a parochial unwillingness to share the Missouri River Basin's resources for the benefit of all. We submit that Congress, which approved a flexible program designed to meet the evolving water resource needs of the entire basin (see U.S. Br. 34-37), did not mandate the inequitable and inefficient result that respondents seek here.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted

CHARLES FRIED
Solicitor General

RALPH W. TARR
Solicitor
Department of the Interior

SUSAN J. CRAWFORD
General Counsel
Department of the Army

OCTOBER 1987

[21] The lower basin states, which receive about twice the rainfall of the upper basin states (see *The World Almanac and Books of Facts* 750 (1987)), object to the modest ETSI diversion on the ground that the water should remain available for their existing and future use (Mo. Br. 3, 15, 21 & n.26; Mo. Amended Complaint para. 85). The Kansas City Southern Railroad, which transports coal and other products in the Missouri Basin, objects to the ETSI contract on the dubious ground that the diversion might affect its water supply at its corporate headquarters (KCS Ry. Br. 8 n.12).

U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60080

Supreme Court, U.S.
FILED
MAY 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-939, 86-941

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

STATE OF MISSOURI, ET AL.,
Respondents.

ETSI PIPELINE PROJECT,
Petitioner,

v.

STATE OF MISSOURI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF MONTANA, NORTH DAKOTA, SOUTH DAKOTA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL T. GREELY*
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

ROGER A. TELLINGHUISEN
Attorney General of South Dakota
GIBSON, DUNN & CRUTCHER
Charles J. Meyers*
1801 California Street,
Suite 4200
Denver, Colorado 80202
(303) 298-7200

NICHOLAS J. SPAETH*
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

JOSEPH B. MEYER*
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE ACT GRANTS PRIORITY TO UPSTREAM BENEFICIAL CONSUMPTIVE USE OVER DOWNSTREAM NAVIGATION USE OF MISSOURI RIVER WATER; GIVES AUTHORITY TO THE BUREAU TO STORE WATER AND DELIVER IT ACCORDING TO THE RECLAMATION LAWS; AND CONFIRMS THE SOVEREIGN POWER OF THE UPPER BASIN STATES TO ALLOCATE SUCH WATER	7
A. The O'Mahoney-Millikin Amendment of Section 1(b) Protects Local Consumptive Use	13
B. The Corps and Bureau Share Authority Over the Mainstem Reservoirs	16
II. THE LEGISLATIVE HISTORY CONFIRMS THE FOREGOING INTERPRETATION OF THE ACT THAT (1) THE BUREAU AND THE CORPS SHARE AUTHORITY OVER STORAGE IN THE DAMS, (2) BENEFICIAL CONSUMPTIVE USE WAS PREFERRED OVER NAVIGATION AND (3) STATE CONTROL OF WATER RESOURCES WAS MAINTAINED	25
A. The Pick-Sloan Plan, Adopted by Congress, Reflects Agreement for Shared Authority Over Stored Water Between the Corps and the Bureau	25
B. The Debates Show That Congress Intended a Preference for Consumptive Uses Over Navigation Uses and Thus Intended to Confirm the Right, Power and Authority of the Upper Basin States Over Water Stored Within Their Boundaries	34
CONCLUSION	42

Page

90 Cong. Rec. 2835 (1944) 39
90 Cong. Rec. 2836 (1944) 36, 41
90 Cong. Rec. 2837 (1944) 41
90 Cong. Rec. 2838 (1944) 36
90 Cong. Rec. 2839 (1944) 36
90 Cong. Rec. 2840 (1944) 39
90 Cong. Rec. 2841 (1944) 39
90 Cong. Rec. 2842 (1944) 41
90 Cong. Rec. 2843 (1944) 36
90 Cong. Rec. 2844 (1944) 36
90 Cong. Rec. 2857 (1944) 36, 39
90 Cong. Rec. 2911 (1944) 36
90 Cong. Rec. 2912 (1944) 39
90 Cong. Rec. 2913 (1944) 35, 36
90 Cong. Rec. 2920 (1944) 41
90 Cong. Rec. 4119 (1944) 38
90 Cong. Rec. 4123 (1944) 37, 41
90 Cong. Rec. 4124 (1944) 41
90 Cong. Rec. 4125 (1944) 32
90 Cong. Rec. 4130 (1944) 36
90 Cong. Rec. 4131 (1944) 41
90 Cong. Rec. 4133 (1944) 31
90 Cong. Rec. 4134 (1944) 32, 35, 37
90 Cong. Rec. 4139 (1944) 38
90 Cong. Rec. 4140 (1944) 35, 37
90 Cong. Rec. 4141 (1944) 31, 35, 38
90 Cong. Rec. 4142 (1944) 35, 41
90 Cong. Rec. 4143 (1944) 32
90 Cong. Rec. 4197 (1944) 32, 35, 37, 38
90 Cong. Rec. 4199 (1944) 41
90 Cong. Rec. 4202 (1944) 32
90 Cong. Rec. 4212 (1944) 36, 38
90 Cong. Rec. 4213 (1944) 37
90 Cong. Rec. 4214 (1944) 38

Page

90 Cong. Rec. 4215 (1944) 35
90 Cong. Rec. 4216 (1944) 35, 38
90 Cong. Rec. 8227 (1944) 39
90 Cong. Rec. 8245 (1944) 35
90 Cong. Rec. 8250 (1944) 25
90 Cong. Rec. 8251 (1944) 25, 41
90 Cong. Rec. 8252 (1944) 39
90 Cong. Rec. 8253 (1944) 41
90 Cong. Rec. 8374 (1944) 25, 39
90 Cong. Rec. 8375 (1944) 35
90 Cong. Rec. 8422 (1944) 25
90 Cong. Rec. 8485 (1944) 4, 36, 39
90 Cong. Rec. 8489 (1944) 26
90 Cong. Rec. 8545 (1944) 35
90 Cong. Rec. 8546 (1944) 31, 33
90 Cong. Rec. 8547 (1944) 36
90 Cong. Rec. 8548 (1944) 33, 35
90 Cong. Rec. 8549 (1944) 33, 35
90 Cong. Rec. 8551 (1944) 4
90 Cong. Rec. 8553 (1944) 36
90 Cong. Rec. 8671 (1944) 36
90 Cong. Rec. 8672 (1944) 36
90 Cong. Rec. 8673 (1944) 36
90 Cong. Rec. 9263 (1944) 36
90 Cong. Rec. 9279 (1944) 4

OTHER AUTHORITIES

A. Maass, *Muddy Waters, The Army Engineers and the Nation's Rivers* (1951) 11

M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan* (Univ. of Illinois Press, 1955) 13, 25, 36, 39, 40

U.S. Army Engineer Division, Missouri River Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual* (1979) 19, 20

U.S. Army Corps of Engineers, Missouri River Division, *1986-1987 Annual Operating Plan* (1986) 3, 19, 20

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-941

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

No. 86-939

ETSI PIPELINE PROJECT,

Petitioner,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF MONTANA, NORTH DAKOTA, SOUTH DAKOTA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The States of Montana, North Dakota, South Dakota, and Wyoming as *amici curiae* pursuant to Supreme Court Rule 36.4 urge the Court to reverse the judgment of the United States

Figure A: Map of Missouri River Basin (*reprinted from* U.S. Army Corps of Engineers — Missouri River Division, *1986-1987 Annual Operating Plan*).

Court of Appeals for the Eighth Circuit in *Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986) for the reasons set forth herein. This brief is presented to support and supplement the arguments presented by the Solicitor General and ETSI Pipeline Project (formerly designated Energy Transportation Systems, Inc.), as Petitioners. This Court granted the petitions for certiorari in and consolidated the above-captioned cases on March 2, 1987. On April 9, 1987, the Court extended the time for Petitioners to file their briefs on the merits to and including May 16, 1987. On March 31, 1987, Justice Blackmun granted *amici* leave to file a 50-page brief.

INTEREST OF AMICI CURIAE

The States of Montana, North Dakota, South Dakota and Wyoming (hereinafter "Upper Basin States") comprise the entire Upper Basin of the mainstem of the Missouri River and its principal tributaries. *See* Figure A (map of Missouri River Basin). All six mainstem dams on the Missouri River lie within the territorial boundaries of the Upper Basin States. Those dams are:

Name	Gross Storage Capacity[1]
1. Fort Peck (in Montana)	18,909,000 acre-feet
2. Garrison (in North Dakota)	23,923,000 acre-feet
3. Oahe (in North and South Dakota)	23,337,000 acre-feet
4. Big Bend (in South Dakota)	1,874,000 acre-feet
5. Fort Randall (in South Dakota)	574,000 acre-feet
6. Gavins Point (in South Dakota and Nebraska)	504,000 acre-feet

The dams were constructed under the authority of the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (hereinafter the "Act").

The instant controversy arose when the South Dakota Water Management Board granted a permit for energy industry

[1] *See* U.S. Army Corps of Engineers, Missouri River Division, *1986-1987 Annual Operating Plan*, Plate No. 11 (Summary of Engineering Data — Missouri River Main Stem Reservoirs).

use to the South Dakota Conservancy District for the annual consumptive use of 50,000 acre-feet of water stored in Lake Oahe. The South Dakota Conservancy District thereupon assigned the permit to the ETSI Pipeline Project (hereinafter "ETSI"), which intended to use the water for processing coal for transportation in a slurry pipeline from Wyoming to the Gulf Coast States. ETSI then obtained a Water Service Contract from the Bureau of Reclamation ("Bureau") to compensate the Bureau for the service of providing storage of water allocated to reclamation projects not yet constructed.[2] The Bureau provides this reclamation storage in Lake Oahe for the benefit of Upper Basin States and has authority under the reclamation laws to make such storage available for municipal and industrial use.[3] ETSI also obtained a permit from the United States Army Corps of Engineers ("Corps") to construct a pumping station for removal of water from Lake Oahe and a right-of-way from the Corps for a pipeline across federal land adjacent to Oahe.

The States of Iowa, Missouri, and Nebraska (hereinafter "Lower Basin States"), Respondents herein, commenced this lawsuit in federal district court in Nebraska to block ETSI's diversion of water from Lake Oahe. The ostensible purpose of the suit was to challenge the authority of federal officials to execute certain contracts regarding Lake Oahe water. But the real issues transcend the question of bureaucratic authority and involve fundamental questions of priority between downstream navigation uses and upstream beneficial consumptive uses of mainstream Missouri River water and the sovereign right, power and authority of the Upper Basin States over the waters

[2] The Bureau of Reclamation does not own water, allocate water rights or sell water; it merely performs the service of storing water. *See* 90 Cong. Rec. 8485 (Sen. O'Mahoney), 8551 (Sens. O'Mahoney and Burton), 9279 (amendments nos. 11 and 13) (1944).

[3] Reclamation Project Act of 1939, § 9(c), 53 Stat. 1187, 1194-95 (codified at 43 U.S.C. § 485h(c)).

of the Missouri River stored for reclamation purposes behind the mainstem dams located in the Upper Basin States.[4]

The Eighth Circuit's ruling in favor of the Lower Basin States in *Missouri v. Andrews* threatens to place the entire storage capacity of mainstem dams on the Missouri River under the effective control of the Corps of Engineers, deprive the Secretary of Interior of authority to devote any mainstem Missouri River water to reclamation purposes, and thus substantially limit the Upper Basin States' right, power and authority to allocate the use of waters wholly within their territorial boundaries. It also upsets the balance Congress struck in the Missouri Basin between state and federal authority over the river and between Upper Basin and Lower Basin States over its use. The United States has recognized the error in the lower court's division of authority between the Corps and Bureau and, as Petitioner herein, is aggressively seeking to correct that error. Because of the guileful drafting of Respondents' Complaint, Montana, North Dakota and South Dakota appear before this Court not as parties but as *amici curiae* only. These States, as well as Wyoming, have more at stake than either Petitioner, because the ruling below deprives them of their sovereign power over their most precious natural resource, their water.

---

[4] Recognizing that the dispute presented a controversy between states, South Dakota filed an original action in this Court. *See* South Dakota v. Nebraska, et al., No. 103 Orig. North Dakota intervened in that action and Wyoming joined as an *amicus*. A "Renewed Motion For Leave To File Complaint" is pending, awaiting the outcome of this case.

line Project ("ETSI") without obtaining the approval of the Army Secretary. The contract would have allowed ETSI to take 20,000 acre feet of water per year from the Oahe Reservoir for use as a transportation medium for crushed coal in a proposed pipeline extending from the Powder River Basin in Wyoming to power plants in the mid-South. The private party respondents, along with the States of Missouri, Iowa and Nebraska (hereinafter "State respondents") then brought the instant proceedings challenging the contract on several grounds in federal court.

On May 3, 1984, Chief Judge Warren K. Urbom of the United States District Court for the District of Nebraska ruled in favor of one argument advanced by both the private party and State respondents, concluding that the 1944 Flood Control Act did not provide the Interior Secretary authority to approve the ETSI contract. Accordingly, Judge Urbom entered summary judgment against the petitioners, permanently enjoining contract performance. ETSI, Inc. and the Interior Secretary appealed Judge Urbom's decision.[2]

On July 31, 1984, ETSI announced that it had terminated its project. The respondents then suggested that the appeals should be dismissed as moot or unripe. After remanding the proceedings to the District Court for an initial mootness determination, a split panel of the Eighth Circuit ruled that the case was not moot.

The Eighth Circuit issued its 2-1 decision on March 31, 1986 affirming Judge Urbom on the merits of the appeal. The Court of Appeals concluded that the purpose, plain language and legislative history of the 1944 Flood Control Act failed to provide authority for the Interior Sec-

---

[2] After initially dismissing the private party respondents for lack of standing to challenge the Interior Secretary's authority, Judge Urbom vacated that decision and allowed them to participate in the appeals. The Eighth Circuit did not reach the issue of standing with respect to the private party respondents in its opinion below, and that issue is not raised here by the petitioners.

retary to enter unilaterally into the ETSI contract. An evenly divided Eighth Circuit denied rehearing on July 10, 1986.

SUMMARY OF THE ARGUMENT

This case does not merit review by the Court. It is correctly decided, and it has limited effect.

This case concerns the only contract ever signed by the Secretary of the Interior in his Department's effort to market water for industrial use from a main stem Missouri River reservoir absent prior Army approval. The project which required the contract has been terminated. The decision below closely follows the language of the 1944 Flood Control Act in enjoining the contract, and leaves available the Army procedures Congress clearly delineated in the 1944 Act for access to main stem Missouri River waters for industrial use.

The decision relies as well upon the legislative history of the 1944 Flood Control Act, which includes two flat rejections of amendments that would have granted the Interior Secretary authority like that he now claims. Given the clear assignment of industrial water marketing responsibility to the Army spelled out in the 1944 Act, the Court of Appeals properly refused to defer to Interior's assertion of implied competing authority. In so doing, the Court below remained faithful to the purpose of the Congress when it allocated the authority for Missouri River Basin projects between Army and Interior.

REASONS TO DENY THE PETITIONS

I. The Decision Below Is Limited Both In Scope And Effect Because The ETSI Project Has Been Terminated And Because That Project Was The Only Element Of Interior's Unilateral Water Marketing Program.

There are no broad questions of law presented by this case. To the contrary, given the current state of the facts, the decision below has a decidedly limited effect.

First, the ETSI contract enjoined in this action was the only contract ever entered into by the Secretary of the Interior under his plan to market water for industrial use from main stem Missouri River reservoirs without prior Army approval or authorization.[3] Apparently Interior's program is now dormant. Therefore, any ruling in this case would have no effect on any existing efforts by the Interior Secretary to implement that program.

Second, ETSI announced the termination of its project in July of 1984 and has not revived the project. Moreover, on July 31, 1984, ETSI terminated its agreement with the South Dakota Conservancy District for assignment of a water right from Oahe Reservoir and has not renewed that agreement. Indeed, ETSI, Inc., which was the corporate entity named to represent ETSI as a party below, has been dissolved.[4] Thus there is a real question whether this case presents any live controversy as to ETSI.

For these reasons, the decision raises no issue worthy of review by this Court.

II. The Decision Below Leaves Industrial Access To Main Stem Missouri River Water Undisturbed.

A. The Army Secretary Remains Authorized To Enter Into Industrial Water Marketing Contracts At Main Stem Missouri River Reservoirs.

The petitioners and *amici* argue that the decision below forecloses industrial access to water in main stem Mis-

---

[3] The petitioners refer to three contracts for the industrial use of water from Missouri River main stem reservoirs which they claim could be affected by the decision below. However, each of these contracts was entered into following the procedures adopted in the MOU. Thus, the Eighth Circuit correctly found that the ETSI contract is the only example of Interior's assertion of authority under the 1944 Act without prior approval by the Army. (See Pet. App. 11a.)

[4] ETSI, Inc. advised the Clerk of this Court that it had been dissolved by letter dated January 27, 1987.

souri River reservoirs. This argument largely ignores the Secretary of the Army's ability to market industrial water from those very reservoirs.

The government attempts to minimize the fact that access to industrial water on the Missouri is available through the Army by focusing solely on the Interior Secretary while conceding in a footnote that its petition raises no issue concerning Army's authority. Hodel Pet. at 12 n.13. ETSI briefly describes Army's authority, but suggests that it is insufficient despite the fact that the Army enjoys power to make available water in the amounts the ETSI project required. ETSI Pet. at 20 n.28.

In any event, the decision below leaves in place the Army's historical statutory ability to market water for industrial use either under Section 6 of the 1944 Flood Control Act, 58 Stat. 890 (codified at 33 U.S.C. § 708), or under the 1958 Water Supply Act, 43 U.S.C. § 390b (b). Under that Army authority, if the ETSI project were still alive, there would be nothing to prevent it from applying, or from fostering an application, to the Army for the water service it requires.

In fact, after entry of the ruling below by the District Court, the State of South Dakota filed precisely such an application on ETSI's behalf with the Army Corps of Engineers, invoking the 1958 Act. The Corps immediately began processing that application, and halted the process only upon termination of the ETSI project. The fact that the petitioners availed themselves of existing Army procedures competely belies their suggestion here that the decision below "locks up" the water in Oahe reservoir and prevents industrial use.[5]

---

[5] The petitioners' additional suggestion that marketing water for industrial use by Army rather than by Interior would adversely affect the government's ability to recoup costs is likewise incorrect. Both Section 6 of the 1944 Flood Control Act, and the 1958 Water

B. Previous Contracts Entered Into By The Interior Secretary With Prior Army Approval Are Unaffected By The Decision.

Given the admitted existence of Army authority which provides adequate procedures for industrial use of main stem Missouri River water,[6] the Secretary of the Interior can only argue that the decision below should be reviewed merely because he has entered into other "similar" contracts, and "may wish to execute other such contracts in the future." Hodel Pet. at 13. As noted earlier, however, the Court of Appeals correctly determined that the ETSI contract is the *only* contract for industrial water use from Army reservoirs on the Missouri River ever entered into unilaterally by the Interior Secretary. (See Pet. App. 11a.) Accordingly, the decision below has no effect on other contracts.

Additionally, to the extent the Interior Secretary believes that his Department should be involved in industrial water service contracts at main stem Missouri River

---

Supply Act, contemplate that the Army will require payment for industrial water use. In fact, in Section 932 of the Water Resources Development Act of 1986, the Congress recently reaffirmed its intention that Army recoup costs for industrial water use. 132 Cong. Rec. H11511 (October 17, 1986); *see* 132 Cong. Rec. S2440 (March 11, 1986).

[6] Existing Army regulations under the 1958 Water Supply Act allow up to 50,000 acre feet of water to be marketed from Army reservoirs annually for industrial use. Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, Section 7.3(b) (January 29, 1982). Respondents understand that changes in policy under Section 6 of the 1944 Act that would allow industrial marketing in even greater volumes are currently under review by the Army. The private party respondents note this recent development, as well as the Congressional action identified in the previous footnote, in order that the Court be fully apprised of matters that may affect the petitions. *See, Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985).

reservoirs, he remains free under the decision below to explore some new understanding with the Army Secretary, or to return to the Congress to seek the authority which Congress refused him in 1944. In any event, the fact that the Interior Secretary may wish at some future time to enter into other industrial water service contracts with entities who are not parties here surely provides no basis for this Court to review this case. *See, International Paper Co. v. Ouellette*, 55 U.S.L.W. 4138, 4146 (U.S. January 21, 1987) (Stevens and Blackmun, J.J., concurring in part and dissenting in part) (Court does not sit to draft advisory opinions for possible future guidance of other courts).

III. The Decision Below Is Correct On The Merits And Is Reasonable As A Matter Of Public Policy.

A. The Decision Is Fully Supported By The Plain Language And Legislative History Of The 1944 Flood Control Act, Which Denies The Interior Secretary Authority To Enter Into The ETSI Contract.

The Court of Appeals decision is clearly correct on the merits. It is fully supported not only by the plain language of the 1944 Flood Control Act, which sets out the allocation of authority in the Missouri River Basin between the Interior Secretary and the Army Secretary, but also by the legislative history of that Act.

Sections 6, 8 and 9 of the 1944 Act dictate that Army rather than Interior enjoys the authority to market water for industrial use from main stem Missouri River reservoirs. In brief, Section 6 provides that the Army Secretary shall have authority over all industrial water uses at reservoirs he controls. (Pet. App. 81a.) With respect to such Army-controlled reservoirs, Section 8 provides the Interior Secretary with authority over only such water and water works as are used in irrigation. (Pet. App. 82a-83a.) Finally, Section 9(c) triggers the

Interior Secretary's power under the reclamation laws only with respect to those projects which have been undertaken by him. Those projects do not include Oahe.[7] (Pet. App. 83a-84a.)

Therefore, because ETSI sought water for industrial use (not for irrigation), and because Oahe was built and is operated by the Army, the plain language of the 1944 Act simply does not grant the Interior Secretary authority to enter into the ETSI contract. Instead, the language of the Act directs those seeking Oahe water for industrial purposes to make their agreements with the Army. (See Pet. App. 18a-21a.)

Since the plain language of the statute dictates only one conclusion, that language governs. *United States v. Clark*, 454 U.S. 555, 560 (1982); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978). Accordingly, the decision below was entirely correct, and it does not merit review.

Moreover, even if the language of the 1944 Flood Control Act were not so conclusive, the legislative history of the Act demonstrates without question that the Interior Secretary does not possess the authority he seeks. Specifically, during the deliberations attending passage of the 1944 Act, when confronted with then-Secretary Ickes' argument that Interior should be granted authority to enter into industrial water service contracts at reservoirs such as Oahe, Congress refused to accept his proposed amendment. (See Pet. App. 28a-29a). In addition, during those same 1944 deliberations, Congress deleted language proposed for Section 8 which would have granted the Interior Secretary broad authority to regulate water stored in Oahe. Instead, Congress substituted the current language of Section 8, which limits Interior's authority

---

[7] The petitioners do not dispute that the Oahe Reservoir was constructed and is operated by the Army Department, rather than by the Interior Department.

over main stem reservoirs to regulation of water used in irrigation. (See Pet. App. 24a-28a.)

These actions by the 1944 Congress—actions that go unmentioned by the petitioners despite being central to the decision below—demonstrate that Congress considered and denied the very authority which the Interior Secretary now seeks.

B. The Decision Properly Declines To Defer To An Interpretation Of The 1944 Flood Control Act By The Interior Secretary Because That Interpretation Conflicts With The Act's Plain Language And Legislative History As Well As With A Contrary Interpretation By The Army.

The Interior Secretary and ETSI argue finally that the decision below should be reviewed for the reason that it undermines the concept of deference to agency interpretations of their empowering statutes articulated in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Hodel Pet. at 16; ETSI Pet. at 24-25. However, the decision below is fully consonant with *Chevron* and its progeny. It formulates no new deference principles, and it correctly applies existing law.

Contrary to the suggestion by ETSI, the decision below does not attempt to carve out a "jurisdictional issue" exception to deference. Instead, the Court of Appeals expressly relied upon *Chevron* to inform its analysis. (See Pet. App. 32a-33a.) As the court below correctly observed, *Chevron* and its progeny counsel deference when two conditions obtain: first, the agency offering the construction must enjoy the power to administer the provision it construes; second, the construction must be reasonable. Neither of these circumstances is found here.

As discussed earlier, Section 6 of the 1944 Flood Control Act clearly authorized the Army Department to market water for industrial use from main stem Missouri River reservoirs, and the 1944 Congress rejected

language which would have granted similar authority to the Interior Department. Thus, the 1944 Act simply does not empower Interior to market water for industrial use from Oahe Reservoir. Moreover, the internal memorandum by Interior's Solicitor prepared thirty years after the fact in 1974, and to which the petitioners insist deference is due, unreasonably ignored both the language of Section 6 and the legislative history of the 1944 Act. In addition, the Acting General Counsel of the Army expressly disagreed with the Solicitor's conclusion in a contemporaneous analysis prepared during 1974. Accordingly, this case simply presents no basis for deference under the reasoning of *Chevron*.

Each of the other cases relied upon by the petitioners is distinguishable on the same ground. Unlike this case, in each of the petitioners' cases the statute under review unequivocally empowered the agency offering the interpretation to administer the provision in question.[8]

For example, in the case cited prominently by ETSI, *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986), this Court deferred to an interpretation by the CFTC of its own enabling statute (the Com-

---

[8] *See, Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3250 (1986) (review of CFTC interpretation of its own enabling act); *Young v. Community Nutrition Inst.*, 106 S.Ct. 2360, 2362, 2366 (1986) (review of interpretation by FDA of act which expressly vested interpretive power in FDA); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 106 S.Ct. 1931, 1935, 1938-39 (1986) (review of FDIC interpretation of its enabling laws); *United States v. City of Fulton*, 106 S.Ct. 1422, 1426 and n.3, 1427-28 (1986) (review of Energy Secretary's interpretation of provision which unquestionably vested power in him); *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 457 and n.1 (1986) (review of Corps of Engineers interpretation of Clean Water Act provision which expressly empowered Corps to control permits affecting wetlands); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530-31 n.16 (1985) (review of interpretation by HHS Secretary of Medicaid provision under act which expressly provided interpretive authority to the Secretary);

modities Exchange Act) only after noting that the interpretation was a "longheld position" which was "well within the scope of its delegated authority." *Id.* at 3254. Similarly, in the one case relied upon by the Interior Secretary, *United States v. City of Fulton*, 106 S.Ct. 1422 (1986), this Court deferred to an interpretation of Section 5 of the 1944 Flood Control Act by the Secretary of Energy after emphasizing that there was no question concerning the existence of his authority to administer the section under review. *Id.* at 1426-1427. In this case, the existence of authority is precisely the question presented. For this reason, the Court of Appeals properly declined to defer to the Interior Secretary's unreasonable construction of the 1944 Flood Control Act.[9]

C. The Decision Furthers The Public Interest By Confirming The Procedures That Protect Existing Users Of Missouri River Water.

The decision below should remain undisturbed for an additional reason. Unlike the result which would obtain if the petitioners were to prevail, the decision below protects the rational division of authority between the Interior Department and the Army Department established by the 1944 Congress. Under the decision, those seeking water for industrial purposes from main stem Missouri River reservoirs can simply apply to the Army

---

Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 118 n.2 (1985) (review of EPA interpretation of provision of Clean Water Act which expressly directed EPA to administer its terms).

[9] In a final attempt to persuade this Court of the need to review this case, the petitioners emphasize the even division of the Court of Appeals in denying rehearing. This argument of course overlooks the fact that there was no division whatever between the conclusions of both lower courts; the Court of Appeals affirmed the district court's conclusion on the merits. In any event, a closely-divided denial of rehearing does not provide a sufficient basis for certiorari. *See, Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (certiorari denied when court of appeals evenly split in denying rehearing).

under Section 6 of the 1944 Act (or under the 1958 Water Supply Act) rather than applying to the Secretary of the Interior under Section 9(c). Unlike the provisions of the reclamation laws which are triggered by Section 9(c), Section 6 requires the Army to consider the effect of the application upon existing users of water. The 1958 Act likewise protects against any significant changes in the operations or purposes of the affected reservoir as a result of industrial water diversions.

Thus, unlike Section 9(c), both the 1958 Act and Section 6 contain protections against excessive water depletion from main stem reservoirs of the Missouri. Allowing Interior to compete with Army for the marketing of water for industry from these reservoirs would upset the existing allocations of responsibilities which allow for smooth functioning of the two agencies in protecting all those who now depend upon the waters of the Missouri. For this reason, the decision below is not only correct, it is in the public interest.

CONCLUSION

For each of the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM E. WALTERS, III *
WALTERS & THEIS
2015 York Street
Denver, Colorado 80205
Attorney for the Iowa, Nebraska and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America

RODNEY M. CONFER
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
Of Counsel

STEPHEN E. ROADY *
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700
Attorney for The Kansas City Southern Railway Company

RONALD J. WILSON *
SIERRA CLUB LEGAL DEFENSE FUND
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
Attorney for The Sierra Club

* Counsel of Record

the downstream states. Instead of a law that reserved Missouri River waters within the four western reclamation states to those states for allocation according to state law and for reclamation development in cooperation with the Bureau of Reclamation, in Respondents' view Congress turned those waters over to the Corps. Obviously, Congress did no such thing.

What then did Congress intend in Section 6? The key term is "surplus water," and that term is not defined in the Act. However, the concept was not new in legislation authorizing Corps Civil Works projects. The Rivers and Harbors Act of 1888, 25 Stat. 400, 417, granted the Secretary of War authority to license private power generation on a Corps project, "*Provided*, that the leases or licenses shall be limited to the use of the surplus water not required for navigation . . . ." Fourteen years later, in the Rivers and Harbors Act of 1902, a similar licensing authority was granted to the Secretary with an identical proviso limiting the licenses "to the use of the surplus water not required for navigation . . . ." 32 Stat. 331, 358.

Given this background and the structure of the 1944 Act, the term "surplus water" should be construed as water under the jurisdiction of the Corps that becomes, from time to time, surplus to the needs of navigation and flood control. In practicality, these will be flood waters. When the river is full and a flood occurs, there is need to use the empty flood control capacity of the reservoirs and no need to release water for navigation. Those flood waters are surplus to the purposes of the Corps and are subject to the Corps' contracting authority.

It should be recalled that Section 10 of the 1944 Flood Control Act authorizes some 90 projects located elsewhere in the country than in the Missouri Basin, and that many of the provisions of the Act were standard phraseology in Corps' Civil Works legislation. Section 6 applies, of course, to the Section 10 projects as well as to the Missouri Basin projects. Limiting the Corps' Section 6 authority over the Missouri Basin dams to

that portion of the stored water devoted to Corps functions allows Section 6 to operate equally on Section 10 projects and Missouri Basin projects, harmonizes the section with other sections of the Act protecting states' rights in mainstream water and tracks earlier usage of the term "surplus water" in prior Corps legislation. As demonstrated in Section II of this brief, it also comports with the legislative history and the Corps' reservoir operating regulations.[11]

Prior to the Eighth Circuit's ruling, the Corps defined surplus water as that water which is not otherwise "utilized to fill an authorized project purpose." U.S. Army Corps of Engineers Project Purpose Planning Guidance ER-1105-2-20. The only water that is surplus under this interpretation — and thus available for sale under Section 6 of the Act — is spilled water. Water allocated for reclamation, irrigation, or power generation is not surplus, because it is utilized to fill an authorized project purpose. The court of appeals was aware of this problem but did not offer any satisfactory explanation for how the Corps could redefine "surplus" to satisfy all the consumptive uses that

---

[11] The Corps allocates the storage space in the six mainstem dams into four categories: 1) exclusive flood control reserve; 2) annual flood control and multiple-use capacity; 3) carry-over multiple-use capacity; and 4) inactive capacity. *See* Figure B (diagram); U.S. Army Engineer Division, Missouri River Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual,* V-1 to V-2 (1979). 6.3% of the total mainstem storage capacity of the six mainstem dams is allocated to the exclusive flood control category. *See* U.S. Army Corps of Engineers, Missouri River Division, *1986-1987 Annual Operating Plan,* Plate No. 11 (1986). This space is reserved for "detention of extreme or unpredictable flood flows," *Master Manual, supra,* at V-I. An additional 15.7% of the total mainstem storage capacity is reserved for the annual flood control and multiple-use capacity category. *See 1986-1987 Plan, supra,* at Plate 11. This space is for "normal flood flows" and annual multiple-purpose regulation of the impounded flood waters. *Master Manual, supra,* at V-1. The capacity in this zone is evacuated to a predetermined level by March 1 of each year to provide storage space for the flood season. When this flood water is evacuated, it is used for multiple-use purposes to the extent consistent with the principal concern of flood control. *Id.* at V-1 to V-2. This is the water that may properly be viewed as "surplus water" subject to sale by the Corps under Section 6 of the Flood Control Act of 1944, 58 Stat. at 890 (codified at 33 U.S.C. § 708).

MISSOURI RIVER MAIN STEM RESERVOIRS

COMBINED STORAGE CONTENTS

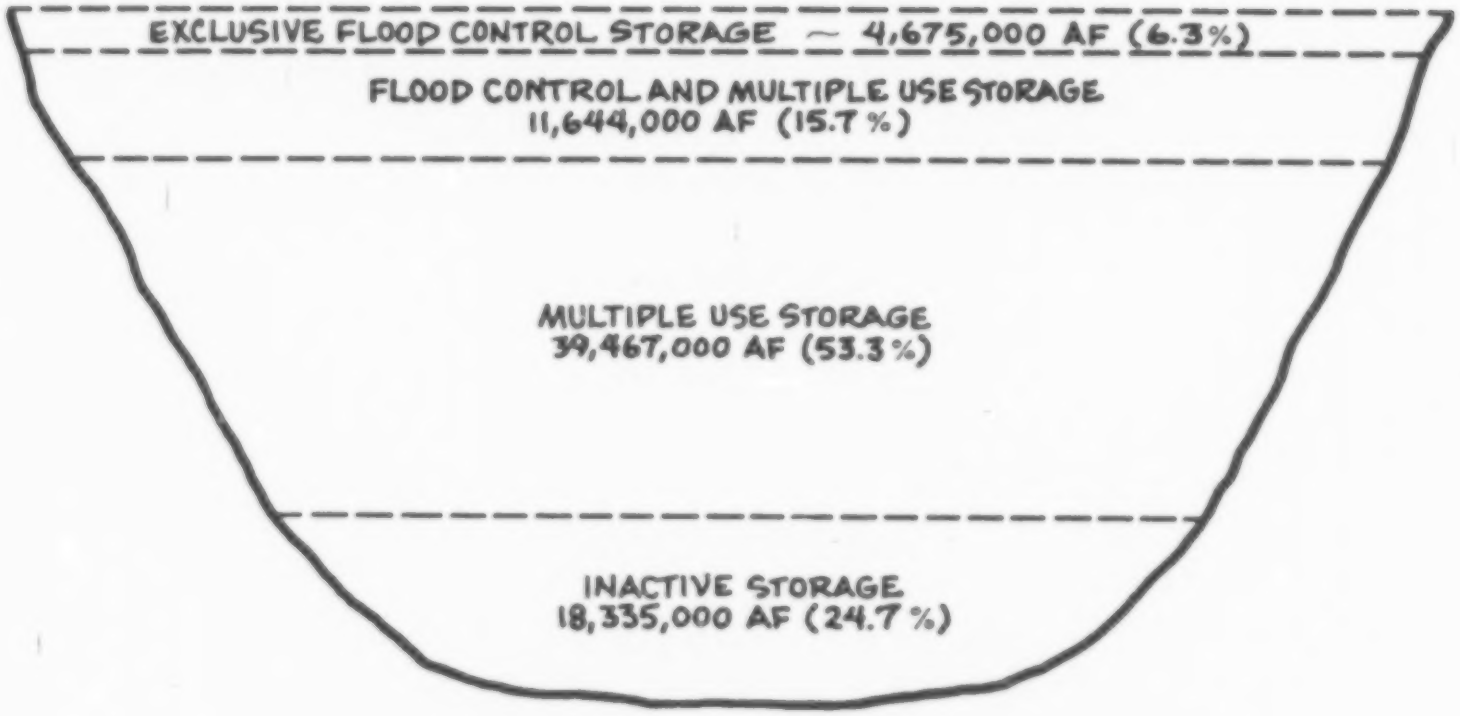


Figure B: Diagram of Storage Zones In Missouri River Mainstem Reservoirs.

Congress anticipated in the Upper Basin States. *See* 787 F.2d at 284-85 n.20, ETSI Pet. App. at 29a. The Lower Basin States disingenuously suggest that the Corps can attempt to broaden the definition of surplus water to include all stored flood waters, while simultaneously admitting that Iowa and Missouri have already protested such a modified definition. *See Brief of Respondents in Opposition to Certiorari Petition,* at 8 n.5. Nevertheless, a broader definition of "surplus water" cannot replace the shared administration between the Corps and the Bureau that Congress established in 1944. *See Reply Brief For The Federal Petitioners in Support of Certiorari Petition,* at 3-6.

In summary, the authority granted the two Secretaries is wholly consonant with the overall congressional scheme for development of the Upper Basin of the Missouri River: the Secretary of the Interior has authority over reclamation developments under the Reclamation Act of 1902, subject to Section 8 thereof, thus accomplishing the congressional purpose stated in the preamble of the 1944 Act "to recognize the interests and rights of the States . . . in water utilization and control . . . .," 58 Stat. at 888 (codified at 33 U.S.C. § 701-1). Interior's authority

---

53.3% of the total mainstem storage is allocated for beneficial consumptive uses, navigation and power production in what the Corps calls the carry-over multiple-use capacity category. *See 1986-1987 Plan, supra,* at Plate 11; *Master Manual, supra,* at V-2. This water is available for consumptive use in accordance with state law and under water supply contracts from the Bureau of Reclamation. The Bureau's authority over this storage does not interfere with the Corps' flood control function, because that function is covered in the first two storage zones discussed above. In fact, consumptive use of stored water cannot interfere with flood control functions, since withdrawal of water from storage makes space available for flood control. The Corps recognizes that "all irrigation and other upstream water uses for beneficial consumptive purposes" must be satisfied each year from this third category, consistent with the O'Mahoney-Millikin preference provision. *See Master Manual, supra,* at III-3 to III-4, IX-1.

The remaining 24.7% of the total mainstem storage capacity is allocated for what the Corps calls "inactive capacity." *See 1986-1987 Plan, supra,* at Plate 11; *Master Manual, supra,* at V-2. The Corps envisions this zone as the "bottom" zone providing sediment storage capacity and a minimum powerhead, as well as a minimum pool for recreation, fish and wildlife. *Master Plan, supra,* at V-2.

over reclamation water, including municipal water supply, also accomplishes the purposes of the O'Mahoney-Millikin Amendment, because beneficial consumptive uses for "domestic, municipal, stock water, irrigation, mining, or industrial purposes," 58 Stat. at 889 (codified at 33 U.S.C. § 701-1(b)), will be under the ultimate control of the Upper Basin States, again by virtue of the requirement of Section 8 that the Secretary of the Interior conform to state law. Finally, the Corps' authority is limited to water (and storage space) to be devoted to traditional Corps functions, navigation and flood control; any water surplus to those functions could be sold for domestic or industrial use. The various parts of the state-federal accommodation fit together, producing a coherent plan that protects the interests of the states but permits the multi-purpose projects to go forward.

Though Congress faced a novel plan for developing a river basin and chose to delegate authority to implement the plan to two government agencies with very different traditions, temperaments and missions, it harmonized the interests of the arid West and the humid Midwest in an intelligible piece of legislation that accomplished the following central objectives:

> 1. The midwestern states received flood protection and the prospect of receiving some additional water for navigation; the western reclamation states were guaranteed the right to use their legal systems to administer their water resources and had the prospect of receiving federal aid to develop irrigation projects.
>
> 2. The use of water for downstream navigation was subordinated to beneficial consumptive uses for state-validated purposes: domestic, municipal, stock watering, irrigation, mining or industrial uses.

To accomplish these objectives, Congress gave authority to the Corps to build the dams and operate the navigation and flood control components of each project, subject to the limitations set out above, and gave authority to the Secretary of

Interior to operate the reclamation components of each project, subject to the provisions of the 1902 Reclamation Act, a notable feature of which is Section 8, which requires the Secretary to conform to state law.

Neither the objectives nor the means of accomplishing them should be surprising in view of the historical antecedents of the Act, especially the traditional relationship of the federal government to the western states regarding water resources. *See California v. United States*, 438 U.S. 645 (1978). For the first time in history a major multi-purpose project was initiated on a river that ran through reclamation states concerned with agricultural development and also crossed states in the humid Midwest concerned with flood control and navigation, the traditional functions of the Corps. Conflicting claims had to be resolved: traditional state control of water resources in the arid West was in competition with the Corps' suzerainty over rivers in the water-rich Midwest, where navigation and (by 1944) flood control were principal concerns and state control over water resource development was a minor consideration because of the plentitude of water.[12] The compromise that was reached

---

[12] Commissioner of Reclamation Harry W. Bashore explained that the clash between Bureau and Corps policies arose because of the climatic differences between the areas where these agencies had traditionally performed their work:

> The problem presented by the Missouri River has arisen because of a clash between policies that are not uniformly adjusted to the climatic differences between the humid East and the Midwest and the arid and semiarid West.
>
> The conflict is between the beneficial, comsumptive use of water in the drier areas for domestic, irrigation, industrial, and mining purposes, and the use of waters in the humid areas to maintain flowing navigation channels. It arises on many, if not all of those streams which, like the Missouri, arise in the mountains west of the 100th meridian and flow out of arid lands into humid climates where irrigation is not necessary to sustain agriculture.
>
> The decision will have to be made by the Congress as to which use of the water resources will take precedence in the West. This same problem was before some of the Western States. The common law of

is what can be expected in a public works project, particularly in 1944, when the New Deal was only 11 years old and when apprehension of a renewed depression upon demobilization of the armed forces was strong: there was something in it for everybody. The Corps was allowed to build major on-stream structures; space was provided in those structures for reclamation water, and the Bureau was encouraged to develop large-scale plans to bring hundreds of thousands of acres under irrigation. The downstream states received substantial protection from floods and regulation of the stream for improved navigation. The upstream states not only had the prospect of new irrigation projects but received a guarantee that their traditional control over their water resources was preserved.

In only one respect was there a head-on collision: if both upstream beneficial consumptive uses and downstream navigation uses could not be satisfied, upstream beneficial consumptive uses had priority. Whether this was the political price for the project or whether it was thought that the conflict would never come about will never be known, but the Act is clear on the outcome: navigation is subordinate. 58 Stat. at 889 (codified at 33 U.S.C. § 701-1(b)). From that fundamental decision flows the remainder of the Act: the Upper Basin States have sovereign authority over allocating beneficial consumptive use; the Bureau has authority over storage water committed for beneficial consumptive use; the Corps has authority over storage space and water used for flood control and navigation.

---

riparian rights which was inapplicable to the conditions of the arid region, was supplanted, in most instances quickly, by the theory of appropriation and beneficial use.

Flood-Control Plans and New Projects: Hearings on H.R. 4485 Before the House Comm. on Flood Control, 78th Cong., 2d Sess. 958 (1944) [hereinafter "Flood Control Hearings"]; *see also Hearings on H.R. 3961 Before the House Comm. on Rivers and Harbors*, 78th Cong., 2d Sess. 2 (1944) [hereinafter "Rivers and Harbors Hearings"] (Gov. Moses: it was inevitable that the Corps and Bureau would come into conflict in the Missouri basin in view of their different missions and responsibilities).

II.

THE LEGISLATIVE HISTORY CONFIRMS THE FOREGOING INTERPRETATION OF THE ACT THAT (1) THE BUREAU AND THE CORPS SHARE AUTHORITY OVER STORAGE IN THE DAMS, (2) BENEFICIAL CONSUMPTIVE USE WAS PREFERRED OVER NAVIGATION AND (3) STATE CONTROL OF WATER RESOURCES WAS MAINTAINED.

A. The Pick-Sloan Plan, Adopted by Congress, Reflects Agreement for Shared Authority Over Stored Water Between the Corps and the Bureau.

The single most important document in the legislative history of the Flood Control Act of 1944 is Senate Document No. 247, 78th Cong., 2d Sess. (1944), known as the Pick-Sloan Plan. Rather than setting forth the details of the mainstem Missouri River dams to be constructed, Section 9(a) of the Act simply incorporated by reference the Pick Report (H.R. Doc. No. 475), the Sloan Report (S. Doc. No. 191) and the Pick-Sloan Plan, which reconciled the differences between the two. *See* 58 Stat. at 891.

The Pick-Sloan Plan was a compromise agreement between the Pick Report, H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944), which the Corps prepared, and the Sloan Report, S. Doc. No. 191, 78th Cong., 2d Sess. (1944), which the Bureau prepared.[13] In six pages, the Plan established a comprehensive

---

[13] The Pick-Sloan Plan was a shot-gun wedding as well as a compromise; the Corps and the Bureau quickly reached agreement because Congress was threatening to establish a Missouri Valley Authority (along the lines of T.V.A.) that would have divested both the Corps and Bureau of *any* authority over the mainstem reservoirs. *See* 90 Cong. Rec. 8250-51 (1944) (summary by Sen. Murray), 8374 (Sen. Murray), 8422 (Sen. Murray); *see generally* M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan,* 88-91, 93-96 (Univ. of Illinois Press, 1955).

The Corps' Pick Report would have established four small mainstem dams near Mobridge, Pierre, Wheeler and Yankton, South Dakota with a

scheme for water storage on the mainstem of the Missouri River and definitively provided that the Corps and the Bureau would share authority over operations of the mainstem dams to be built by the Corps. Pick-Sloan begins by recognizing the following "basic principles":

---

combined total storage capacity of 18,200,000 acre-feet, and one large dam near Garrison, North Dakota with 17,000,000 acre-feet of storage. *See Pick Report,* H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944), at 28 (described in *Pick-Sloan Plan,* S. Doc. No. 247, *supra,* at 2). Fort Peck Reservoir would have been converted into a multiple purpose reservoir, emphasizing irrigation. *Pick-Sloan Plan,* S. Doc. No. 247, *supra,* at 2. Otherwise, the Pick Report was primarily concerned with flood control and navigation, except at Garrison Dam in North Dakota, which also had an irrigation component. *See Pick Report,* H.R. Doc. No. 475, *supra,* at 28, 31; *see also* 90 Cong. Rec. 8489 (1944) (Sen. O'Mahoney: Army plan "dealt primarily with navigation and flood control, with incidental power.").

The Bureau's Sloan Report would have established two small mainstem reservoirs near Wheeler and Joe Creek, South Dakota, with a combined total storage capacity of 5,350,000 acre-feet, one very large mainstem reservoir near Pierre, South Dakota, with storage capacity of 19,600,000 acre-feet, and four tributary reservoirs, with a combined total storage capacity of 6,230,900 acre-feet. *See Sloan Report,* S. Doc. No. 191, 78th Cong., 2d Sess. (1944), at 118 (described in *Pick-Sloan Plan,* S. Doc. No. 247, at 2-3). Fort Peck would have been used primarily for irrigation purposes. *Sloan Report,* S. Doc. No. 191, *supra,* at 115. As would be expected, the Sloan Report was primarily concerned with irrigation uses for Missouri River mainstem water, for the Bureau had long been engaged in comprehensive studies of irrigation in the entire Missouri River Basin. *See, e.g., Sloan Report,* S. Doc. No. 191, *supra,* at 107, 115-17, 123; *see also* 90 Cong. Rec. 8489 (1944) (Sen. O'Mahoney: Bureau plan "dealt primarily with irrigation and reclamation.").

The Pick-Sloan Plan maximized the storage space in the mainstem reservoirs by authorizing both the large dam proposed by the Corps near Garrison, North Dakota (creating what is now Lake Sakakawea) *and* the large dam proposed by the Bureau near Pierre, South Dakota (creating what is now Lake Oahe). The Pick-Sloan Plan also opted for two of the smaller dams proposed by the Bureau (Fort Randall and Big Bend near Wheeler and Joe Creek, South Dakota) and one of the smaller dams proposed by the Corps (Gavins Point near Yankton, South Dakota). *Pick-Sloan Plan,* S. Doc. No. 247, *supra,* at 3. The only mainstem dam proposed by either the Corps or the Bureau that was not approved in Pick-Sloan was the Oak Creek Dam, which was flooded out by the higher Oahe dam proposed by the Bureau.

The substitution of the Bureau's high dam at Oahe for the two low dams proposed by the Corps is further evidence, if such is needed, of the major reclamation ingredient in Pick-Sloan. There would have been no high dam at Oahe, creating a reservoir of 23.3 million acre-feet (about ¾ the size of Hoover Dam's Lake Mead), except for the reclamation component proposed by the Department of the Interior.

> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.
>
> (c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

Pick-Sloan Plan, S. Doc. No. 247, *supra,* at 1. The Plan then discussed the capacity and intended purpose of each new mainstem dam and in every instance emphasized that water would be stored for both navigation and irrigation uses as well as for flood control and other uses:

> [T]he following main-stem reservoirs were recommended in the joint engineering report in order to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses.
>
> . . . .
>
> [The Garrison Dam will provide] a large volume of useful storage capacity for flood control, navigation, and irrigation . . . .
>
> . . . .
>
> The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes.
>
> . . . .
>
> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering

> report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.
>
> . . . .
>
> Development of the Missouri River Basin in accordance with House Document No. 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, as coordinated in the enclosed joint engineering report, if authorized as a unified plan, will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.

Id. at 3-5. In short, whenever navigation was mentioned, so was irrigation.

The specification in the joint report of the Bureau and Corps that the dams were to be operated for both irrigation and navigation/flood control purposes amounted to a delineation of the authority of the two agencies. The Bureau was expert at irrigation of which the Corps knew nothing; the Corps was expert at navigation and flood control, of which the Bureau knew little. The compromise would not have occurred if the authority of the two agencies had not been preserved for each to perform its traditional function. Moreover, as to the irrigation component, only the Bureau satisfied the declaration of policy in the Act's preamble, recognizing "the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . . ." 58 Stat. at 888. The Bureau alone satisfied this policy requirement because it alone operated under the command to conform to state law. *See* Reclamation Act of 1902, § 8, 32 Stat. 388, 390 (codified at 43 U.S.C. §§ 372 and 383).

Other actions of the Corps and the Bureau confirm the agreement to share authority over the stored water. In

commenting on the Bureau's Sloan Report in April 1944, Chief of Engineers, Major General Reybold stated:

> It is essential that the main stem reservoirs in North and South Dakota be built, operated, and maintained by the Corps of Engineers as stated in my report and in your letter of December 17, 1943, both printed in House Document 475. Tributary reservoirs should, when advisable from the standpoint of basin-wide development, be constructed, operated, and maintained by the agency with dominant interest under existing law. In *all* reservoirs, utilization of storage for flood control should be in accordance with regulations prescribed by the Secretary of War and utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior.

Sloan Report, S. Doc. No. 191, *supra,* at 7-8 (emphasis added); *see also Pick Report,* H.R. Doc. No. 475, *supra,* at 4 ("utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior").[14] In the Pick Report Major General Reybold explained, "The Corps of Engineers recognizes the broad and important interests and responsibilities of the Bureau of Reclamation in the Missouri River Basin and will continue to plan its work in that basin so as to coordinate fully the activities of both agencies." *Pick Report,* H.R. Doc. No. 475, *supra,* at 3. The Pick Report discussed the practical aspects of how such joint administration would work:

> In connection with the development of the multiple-purpose projects, those shown for the Missouri River will provide for the maximum practicable storage of water of the main stem. The water to be impounded in these, as

[14] The Corps considered the mainstem Missouri River reservoirs to be multiple purpose reservoirs. The Pick Report that Reybold was endorsing presented a plan "which provides for the construction of 12 additional multiple-purpose reservoirs, 5 on the Missouri River with dams located above Sioux City . . . [and 7 on Missouri River tributaries]." *Pick Report,* H.R. Doc. No. 475, *supra,* at 16.

> well as the other multiple-purpose structures shown in tables 1 and 2, will be utilized to produce the maximum practicable development of irrigation, navigation, power, and other multiple purposes. However, sufficient storage will be provided in each reservoir to provide for the needs of local flood protection downstream from the reservoir as well as for the needs of the general comprehensive plan for flood control for the Missouri River Basin. To provide for the maximum utilization of the waters stored in multiple-purpose reservoirs, a plan would be worked out for each structure in collaboration with the various water-use agencies involved. The amount of water to be made available to the Bureau of Reclamation for irrigation would be arrived at after close collaboration with that agency.

Id. at 30. At the House hearings on the flood control bill, Colonel Reber specifically stated that the Bureau would manage irrigation features at dams built by the Corps:

> Mr. Curtis. If the Army constructs any dam that has features in it for irrigation or as a distributing system, its construction and its maintenance and its management for irrigation will be turned over to the Bureau of Reclamation; is that right?
>
> Colonel Reber. That is correct.

Flood Control Hearings, supra, at 1073.

The Bureau shared the Corps' view of how the mainstem dams would be cooperatively administered, with the Corps managing the flood control and navigation functions and the Bureau managing the irrigation and reclamation functions. The Bureau of Reclamation's Board of Review stated in the Sloan Report:

> The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be

> operated by the Corps of Engineers, and where the flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. *All irrigation features should be operated by the Bureau of Reclamation or its agents.* All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. *Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.* In like manner, agencies with jurisdiction over other functions should be recognized.

Sloan Report, S. Doc. No. 191, *supra*, at 11 (emphasis added).

Congressional debates reveal that Congress understood that the two agencies would share authority. In the course of the debates the particular issue of "surplus water" in Section 6 was clarified. Members of Congress debating the Flood Control Act specifically relied on the assurances of the Corps and Bureau in the Pick and Sloan Reports and elsewhere that the Bureau would control storage allocated to reclamation in Corps' constructed reservoirs. *See* 90 Cong. Rec. 4141 (1944) (Rep. Case). When discussing the reference in what ultimately became Section 6 of the Act to "surplus water" that would be subject to disposal by the Corps, the members of Congress understood that surplus water referred only to water stored for purposes within the Corps' traditional domain, flood control and navigation, and would not include reclamation water. *See* 90 Cong. Rec. 4133 (1944) (comments of Rep. Curtis concerning Section 4 [eventually renumbered as Section 6, 90 Cong. Rec. 8546 (1944)]: "It would be my opinion that water appropriated for irrigation is not surplus water."); *see also Flood Control Hearings, supra*, at 559 (testimony of Clifford Stone: surplus water is water impounded by the Corps in a flood that would otherwise be quickly released to maintain future flood storage space). All storage allocated to reclamation was to be regulated by the Bureau of Reclamation under

the federal reclamation laws. 90 Cong. Rec. 4143 (1944) (Rep. Case); *see also id.* at 4125 (colloquy between Reps. Chenoweth and Whittington). Representative Curtis of Nebraska noted that the words of then Section 4 on surplus water were not the "choicest" and asked the following question of Representative Whittington, the chairman of the House Flood Control Committee:

> May I ask the chairman of the committee if he will not agree with me in this statement in order that we might show legislative intent, that it was not our intention to include the sale of water for irrigation purposes under section 4, that that dealt with other uses of water?
>
> [Rep. Whittington] Absolutely . . . .

90 Cong. Rec. 4134 (1944). Representative Whittington then added so "there should not be any uncertainty" that:

> I think there need not be any fear that the intent of the committee as well as the language of the bill would not make it [then section 4] applicable to irrigation. If it were, irrigation would be disposed of by the Secretary of the Interior.

Id.; see also 90 Cong. Rec. 4197 (1944) (Representative Whittington: "as I stated yesterday, the purpose of section 4 in no way involves reclamation."); *see also id.* at 4202 (colloquy between Reps. Curtis and Whittington).

It should be noted that the terms "irrigation" and "reclamation" were used interchangeably by Representative Whittington and others. The functional meaning of both terms is the storage in the six Pick-Sloan reservoirs allocated to Bureau functions. Irrigation and reclamation encompass agriculture but extend also to other beneficial consumptive uses.

When the flood control bill reached the Senate, Senator O'Mahoney proposed an amendment to Section 6 (Section 4 in the House) that would have allowed the Secretary of War to dispose of all stored water at Corps-constructed reservoirs, but that restricted the Secretary in a manner analogous to the

restrictions imposed by the reclamation laws. *See* 90 Cong. Rec. 8548 (1944). Other western senators vigorously opposed this amendment, preferring not to involve the Army in irrigation and reclamation functions at all. *See id.* at 8548-49. These senators preferred the language adopted in the House (and ultimately adopted in Section 6 of the Act) by which the Secretary of the Army was authorized to sell surplus water only for "domestic and industrial uses." 90 Cong. Rec. 8546, 8548 (1944). Senator Hayden believed that the House's use of the terms "domestic" and "industrial" and omission of the term "irrigation," effectively prevented reclamation water from coming within the Corps' domain as "surplus water." *Id.* at 8546.

The Eighth Circuit was aware of the Pick-Sloan Plan, *see* 787 F.2d at 275-76, ETSI Pet. App. at 8a-10a, but utterly failed to appreciate its significance. The court seemed unable to comprehend the concept of shared authority whereby the Bureau could make its reclamation water available for industrial use under the Reclamation Project Act of 1939 at the same time the Corps was selling flood control water for industrial use as "surplus water" under Section 6 of the Flood Control Act of 1944. The court merely restated the district court's simplistic analysis, which concluded that because the Corps built the Oahe dam, Lake Oahe is not a reclamation development and none of its water is subject to the authority of the Bureau.[15] *See* 787 F.2d at 280-81, ETSI Pet. App. at 19a-21a. The court erroneously characterized the question of division of authority

[15] The court of appeals may have believed that it was promoting administrative efficiency by holding that the Corps had sole authority to manage the mainstem Missouri dams. Congress, however, anticipated that the Bureau and the Corps would share authority over the mainstem reservoirs. *See supra*, Section II(A). Congress, the Corps, and the Bureau recognized that individual dams and reservoirs could not be operated in isolation. Management for multi-purpose use required close coordination of operations of each feature and close coordination among agencies and between agencies and state authorities. Thus, flood control and navigation uses for stored water had to be coordinated with irrigation and reclamation uses. *See, e.g., Pick Report*, H.R. Doc. No. 475, *supra*, at 3, 4, 6, 7, 12, 17, 27-29; *Sloan Report*, S. Doc. No. 191, *supra*, at 7, 8, 17, 116, 117.

between the Corps and Bureau as one of fact, reviewable under the clearly erroneous standard. 787 F.2d at 280, ETSI Pet. App. at 19a. Even under that standard, the district court should have been reversed. But the issue is not one of fact; it is the legal question of statutory interpretation. Congress' intent is unmistakable: The Flood Control Act of 1944 adopted the Missouri Basin development plan jointly proposed by the Corps and Bureau; the Corps and Bureau both intended that the Corps would have authority over storage allocated to flood control and navigation and the Bureau would have authority over storage allocated to reclamation and upstream consumptive use. Congress approved and adopted that allocation of authority.

B. The Debates Show That Congress Intended a Preference for Consumptive Uses Over Navigation Uses and Thus Intended to Confirm the Right, Power and Authority of the Upper Basin States Over Water Stored Within Their Boundaries.

The Lower Basin States did not bring this lawsuit as disinterested ombudsmen seeking only to assure that the correct federal agency sign water service contracts. From its inception, this lawsuit has been a thinly veiled artifice to block consumptive use by the Upper Basin States of the mainstream water.[16] The Respondents understand only too well that when Congress chooses the agency to develop a river basin it also chooses the legal regime that will apply to water resource development. The Bureau operates in conformity to state law; the Corps follows a separate agenda and can be insensitive to a state's management of its water resources.[17] So far, the Lower

[16] *See, e.g., Missouri v. Andrews*, No. CV-82-L-442, *Complaint for Injunctive and Declaratory Relief*, paragraphs 26, 49, 55 and 75 (D. Neb. filed Aug. 18, 1982).

[17] Senator Overton explained these agencies' separate roles:

> For years the Army engineers have worked in the Missouri River Basin in order to determine proper projects for flood control and navigation and

Basin States have accomplished their objective in this lawsuit. The Eighth Circuit's decision upsets the division of authority Congress mandated and thus has upset Congress' plan for the use of stored Missouri River water. The decision must be reversed if Congress' will is to be done.

What Congress realized and the Eighth Circuit did not is that the Bureau of Reclamation promotes and facilitates consumptive use of water in the four Upper Basin Reclamation States and does so in tandem with each State's regime for administering water resources. Congress instructed the Bureau in Section 8 of the Reclamation Act of 1902 to defer to state laws governing control, appropriation, use or distribution of reclamation water, and, except where Congress expressly says otherwise, deference to state law has been the Bureau's obligation since 1902. *See California v. United States,* 438 U.S. 645, 653-54, 675, 678 n. 31 (1978). The members of the House and Senate who debated and approved the Flood Control Act of 1944 were fully informed on the Bureau's expertise in irrigation and reclamation and were acutely aware of its obligation to defer to state law.[18] The representatives of the western states

---

> for a number of years the expert engineers of the Bureau of Reclamation have been working in order to decide upon proper projects for irrigation and local beneficial uses of water in the States comprising the Missouri Basin.

90 Cong. Rec. 8375 (1944).

[18] *See* 90 Cong. Rec. 4134 (1944) (Rep. Curtis), 4140 (Rep. Burdick), 4141-42 (Rep. Burdick — quoting Judge Stone), 4197 (Reps. Robinson, Rockwell), 4215 (Rep. Dirksen), 4216 (Rep. Sullivan); 90 Cong. Rec. 8245 (1944) (Sen. Overton), 8545 (quoting letter from Secretary Ickes), 8548-49 (Sen. Hatch); *see also* 90 Cong. Rec. 2913 (1944) (Rep. Lemke in debate on rivers and harbors bill). The Bureau appreciated the significance of not disturbing existing water rights under western states' water law. Bureau Commissioner Bashore testified:

> The fact that the water is apportioned under States laws in the West is a reason why there is very serious danger in the dedication by the Congress of the waters of the great rivers that arise in the arid zone and flow into the humid zone to the purpose of navigation to the exclusion of future irrigation development upstream.

Flood Control Hearings, supra, at 960.

and their allies fought hard in both the House and the Senate to preserve an active role for the Bureau in administration of Missouri River mainstream waters, and they succeeded. The Senate adopted their view in the O'Mahoney-Millikin Amendment, 90 Cong. Rec. 8547, 8553 (1944), and the conference incorporated the Senate language in the final language of the Flood Control Act, 90 Cong. Rec. 9263 (1944). *See* 58 Stat. 887, 888-89. The identical provisions were incorporated in the companion bill that became the Rivers and Harbors Act of 1945, 59 Stat. 10, 10-11. *See* 90 Cong. Rec. 8671-73 (1944).

The legislative history demonstrates that Congress intended the O'Mahoney-Millikin Amendment to ensure that preference would be given to consumptive uses of Missouri River mainstem water over navigation uses. *See, e.g.*, 90 Cong. Rec. 8485 (1944) (Sen. O'Mahoney). Congress considered upstream consumptive uses more worthy than downstream navigation uses. *See* Flood Control Act of 1944, § 1(b), 58 Stat. at 889; *see also* 90 Cong. Rec. 4130 (1944) (Rep. Curtis: noting importance of irrigation); 4212 (Rep. Lemke: Upper Basin States should have preference to their own waters for domestic use and for irrigation).[19] Representative Lemke of North Dakota passionately contrasted the value of irrigation and navigation: "We are not going to take the water from the people in the States where it originated so that some fellow may float a yacht down the lower Mississippi Valley, while the people and their cattle in the upper regions go hungry on

[19] The preference for consumptive uses over navigation uses is also abundantly clear from the debates on the rivers and harbors bill. *See* 90 Cong. Rec. 2836 (1944) (Rep. Barrett), 2838 (Rep. O'Connor), 2839 (Rep. Lemke), 2843 (Rep. Mundt), 2844 (Rep. Dirksen), 2857 (Rep. Robinson), 2911 (Rep. White). Advocates of irrigation use noted how little the Missouri was used for navigation to and from the Upper Basin States. *Id.* at 2913 ("As far as being an avenue for transportation for the upper States it never did exist to any great extent and to what little extent it was used has been so long ago that it no longer remains in the memory of the present generation."). Congress did not have reliable figures on future stream flows under the Pick-Sloan Plan, so it had to establish priorities in the event of a conflict between uses. *See* M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, at 163 (Univ. of Illinois Press, 1955).

account of the lack of food and water." 90 Cong. Rec. 4213 (1944).

Giving the Bureau authority over storage allocated to irrigation and reclamation was an integral part of the mechanism for preferring consumptive uses to navigation uses and for confirming state control over its water. Representative Curtis explained why the flood control bill vested significant authority in the Bureau:

> I believe that the Bureau of Reclamation, being a western agency, being committed to the doctrine of consumptive and beneficial use of water, and in view of its past record covering protection of State rights and the protection of the water rights of the individual, will exercise its authority judicially [sic] and that that is the very best we can do.

90 Cong. Rec. 4134 (1944). The division of authority between the Bureau and the Corps was not the goal in itself, but merely a means to an end — preserving priority for consumptive uses of stored water and guaranteeing to the states their traditional role in the use and allocation of such stored water. *See, e.g.*, 90 Cong. Rec. 4123 (1944) (Rep. Whittington: Committee on Flood Control did not include any provision that would retard reclamation because of concern expressed about the rights of states to the uses of water); 4134 (Rep. Curtis: noting that regulation of reservoir storage space for irrigation water will be turned over to Bureau of Reclamation, which "can be trusted to recognize both State rights and the individual rights of the owners of the water."); 4140 (Rep. Burdick: noting concern with Corps' control over water — "The Reclamation Bureau has worked with the States; they have worked with North Dakota and other States; and the use of water is regulated by the States."); 4197 (Rep. Robinson: requiring that federal government comply with federal reclamation laws would resolve western states' fears that they will lose jurisdiction over waters arising in their states).

This Court cannot rule on the question of division of authority between the Corps and Bureau without taking into account the goals that shaped the division of authority; the evidence is overwhelming that Congress intended to give priority to consumptive uses and defer to state water law. It is therefore anomalous that the Eighth Circuit believed it could not take into account the competing interests of the Upper Basin and Lower Basin States in construing the Flood Control Act's "delicate balance of authority" between the Bureau and the Corps. *See* 787 F.2d at 286, ETSI Pet. App. at 32a. In attempting to avoid the sensitive issues that divided the states of the Missouri Basin, ostensibly because it had to "defer to legislative prerogative," the court of appeals ignored the most probative evidence in the Flood Control Act's legislative history. *Id.* The Eighth Circuit did not have to resolve the dispute between the Upper Basin and Lower Basin States; Congress had already resolved the issue, and the court merely had to take note of Congress' resolution of it, made manifest in its division of authority between the Corps and Bureau and its preference for upstream consumptive uses over downstream navigation uses.

The theme of preserving the Upper Basin States' rights to control a portion of the stored waters within their territorial boundaries permeates the congressional debates on the Act.[20]

---

[20] *See, e.g.*, 90 Cong. Rec. 4119 (1944) (Rep. Mundt: noting need to protect irrigation interests in upper portions of Missouri Valley); 4139 (Rep. Clason: expressing concern that new federal flood control legislation not usurp states' rights to control water within their boundaries); 4141 (Rep. Burdick: expressing fear that arid and semi-arid western states will be divested of title to their own water); 4197 (Rep. Rockwell: in the early days, people in western states fought for right to use water to grow crops and resolved issues through cooperation with Department of Interior); 4212 (Rep. Lemke: protection of irrigation in the Upper Missouri River Basin "is a State-right matter."); 4214 (Rep. Mansfield: water is the lifeblood of the western states; Rep. Cochran: controversy prevailing between flood control and irrigation is actually controversy between Upper Basin States and Lower Basin States); 4216 (Rep. Sullivan: arid-land states seek protection of irrigation and reclamation based on rights and customs enjoyed under riparian and

The representatives of the Upper Basin, led by Senator O'Mahoney (of Wyoming), were concerned that Congress would inadvertently disrupt traditional water rights law and establish new rights to navigation water under its Commerce Clause powers when it passed legislation intended to address the menace of floods on the Missouri that also provided for huge volumes of storage capacity at the same time. For example, Senator Wheeler of Montana stated:

> While it is true that it is a flood-control bill, we must bear in mind that its provisions reach much further than do the provisions of a mere flood-control bill, because in the pending bill an effort is made to lay down a policy not only as to flood control but with respect to the development of power, the sale of power, irrigation, and reclamation.

90 Cong. Rec. 8252 (1944). The immediate impetus of H.R. 4485, which became the Flood Control Act of 1944, was precisely that: flood control. A series of three devastating floods had caused widespread damage in the lower Missouri Valley, and Congress was primed to address the problem. *See* H.R. Rep. No. 1309, 78th Cong., 2d Sess., *reprinted in* 1944 U.S. Code Cong. Serv. at 1349-51; *see generally* M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, 3-5 (Univ. of Illinois Press, 1955). Congress was, however, simultaneously considering legislation to enlarge the channel in the lower portion of

---

appropriation doctrines); 90 Cong. Rec. 8227 (1944) (Sen. Murray [prior to addition of O'Mahoney-Millikin language]: flood control bill does not adequately protect rights of Upper Basin States); 8374 (Sen. Murray: flood control bill has been fought because "it totally ignores the irrigation rights of the States in the upper part of the valley"), 8485 (Sen. O'Mahoney: Pick-Sloan Plan was a "redeclaration of the historic doctrine of priority of the consumptive uses of water in the [arid-land] States"); *see also Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Sen. Comm. on Commerce*, 78th Cong., 2d Sess. 544 (1944) (Gov. Ford [of Montana]: "we are not satisfied with just having the dams; we want the right to the use of the waters behind those dams").

The theme of preserving states' rights also appeared in the debates on the rivers and harbors bill, especially in the house debates that occurred prior to acceptance of the O'Mahoney-Millikin Amendment by the Senate. *See* 90 Cong. Rec. 2835 (1944) (Rep. Barrett), 2840 (Rep. Case), 2841 (Rep. Burdick), 2857 (Rep. Robinson), 2912 (1944) (Rep. Hill).

the Missouri River mainstem (below Sioux City, Iowa) to promote navigation. *See* H.R. 3961, 78th Cong., 2d Sess. (1944) (eventually enacted as the Rivers and Harbors Act of 1945, 59 Stat. 10). This proposal for a channel nine-feet deep to replace the six-foot channel gave the Upper Basin States grave concern because a deeper channel would require larger volumes of water to keep it full, possibly to the detriment of upstream consumptive uses. The Upper Basin States feared that congressional action establishing such a navigation channel would vest water rights in the Lower Basin States where the navigation channel was located and would thus preclude future consumptive uses.[21]

The Upper Basin States mobilized their forces first in the House and then in the Senate. The constant refrain from the Lower Basin States and their allies was that the flood control legislation (H.R. 4485) and rivers and harbors legislation (H.R. 3961) were not intended to create any water rights or to deprive the Upper Basin States of their traditional hegemony over their water. Senator Clark of Missouri argued:

> [T]he bill originally started as a strictly flood-control measure, and . . . the whole question of irrigation and reclamation was injected into the measure entirely improperly and irrelevantly, in my opinion, by an amendment introduced by the Senator from Wyoming [Mr. O'Mahoney], joined in by numerous Senators from other irrigation States.
>
> . . . .
>
> [I]t is unfair . . . to say at this time that the bill is not a strictly flood-control bill . . . .

---

[21] *See, e.g., Flood Control Hearings, supra,* at 1021-22, 1031, 1218, 1222; *Rivers and Harbors Hearings, supra,* at 9. The Missouri Valley Regional Planning Commission had noted in a 1942 study that there was a strong likelihood of a clash between consumptive uses and navigation and that principles of priority should be established. *See* M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan,* 44-45, 67 (Univ. of Illinois Press, 1955). The representatives of the Upper Basin States saw the Pick Report as a threat to continued development of western and Great Plains irrigation. *Id.* at 75.

> [T]hose who were interested in navigation and those who were interested in flood control were not responsible for injecting extraneous issues into [the flood-control bill and rivers and harbors bill].

90 Cong. Rec. 8253 (1944).[22]

The Upper Basin States were not convinced by such easy assurances and demanded the guarantees enacted in the O'Mahoney-Millikin Amendment, reflected in Section 1 of the Flood Control Act of 1944, 58 Stat. at 888-89, and in Section 1 of the Rivers and Harbors Act of 1945, 59 Stat. at 10-11. No observer of the congressional debates could have missed the implications of this victory: Congress had created a priority for consumptive uses of Missouri River mainstem water over navigation uses and had confirmed the Upper Basin States' rights to control a significant portion of the stored mainstem waters. By threatening to place the entire Missouri mainstem storage capacity under the effective authority of the Corps, the Eighth Circuit's ruling is antithetical to Congress' goals as reflected in the provisions of the Act, particularly the O'Mahoney-Millikin Amendment. This Court should correct the Eighth Circuit's gross misconstruction of the Act in order to assure that the vast water resources of the Missouri River Basin will be administered in accordance with Congress' intent, in a manner that preserves the right of all states in the basin to a portion of the benefits from the Missouri.

---

[22] At the hearings on the flood control bill, Colonel Reber repeatedly denied that the Corps' Pick Report would establish any priorities for use of Missouri River water. *See Flood Control Hearings, supra,* at 669, 722, 1061, 1065, 1076. For other examples of the Lower Basin States' denial that the flood control bill and rivers and harbors bill did not affect upstream consumptive uses, *see* 90 Cong. Rec. 2836 (1944) (Rep. Carter), 2837 (Rep. O'Connor), 2842 (Rep. Bell), 2920 (1944) (Rep. Hoeven), 4123 (Rep. Whittington: no provision in H.R. 4485 "would in any way retard reclamation."), 4124 (Rep. Whittington: "There is no real conflict between navigation, flood control, and irrigation"), 4131 (Rep. Curtis: "The approval of the Pick plan does not add or detract from the navigation issue."), 4142 (Rep. Curtis: allocation of water for navigation is not at issue in flood control bill), 4199 (1944) (Rep. Whittington: flood control bill does not embrace any navigation project); 90 Cong. Rec. 8251 (1944) (Sen. Clark: "[T]his is a flood-control bill, not a navigation bill, not a river and harbor bill, not a power bill.").

CONCLUSION

Both the district court and the Eighth Circuit adopted the basic position, variously stated, of the Lower Basin States that until and unless water is actually diverted from Lake Oahe (and the other mainstem reservoirs) and applied to the land to raise crops, the reclamation laws and state law have no application to the waters of the Missouri River stored in the Upper Basin States, and accordingly the Secretary of Interior has no authority over that water. *See, e.g.*, 787 F.2d at 280; 586 F. Supp. at 1273-74.

This is a most convenient argument for the Respondent States in current times, when federally financed irrigation projects are out of favor. By succeeding in the lower courts with the argument, the Lower Basin States obtained from the judiciary what was denied them by Congress — dedication of the river to Lower Basin navigation interests. No doubt Senators O'Mahoney, Millikin and others from the West anticipated federal funding of irrigation projects in the Missouri Basin in due course. But it is impossible to believe that western senators, who insisted on the O'Mahoney-Millikin Amendment and who were aware of the time it takes for arid, Upper Basin areas to develop, agreed that state permits and Bureau water supply contracts for non-agricultural use are void. The proponents of O'Mahoney-Millikin were writing a charter for the Missouri Basin, to endure until Congress — not the courts — changed it. Thus the preamble to the Act and O'Mahoney-Millikin reaffirmed state right, power and authority over the water resource, subordinated downstream navigation use to Upper Basin beneficial consumptive use and implemented those decisions by limiting federal power and Corps authority to navigation and flood control purposes and by imposing the Reclamation Act of 1902 and Section 8 thereof on the operation of the dam for other purposes.

WHEREFORE, the Upper Missouri River Basin States of Montana, North Dakota, South Dakota and Wyoming respectfully request that this Court reverse the judgment of the Court of Appeals for the Eighth Circuit and declare that in accordance with Sections 1(a), 1(b), and 9(c) of the Flood Control Act of 1944, Section 9(c) of the Reclamation Project Act of 1939 and the Reclamation Act of 1902, and especially Section 8 thereof, the Water Service Contract between ETSI and the Bureau of Reclamation, made pursuant to the permit granted by the South Dakota Water Management Board, is valid and enforceable.

Dated: May 1987

Respectfully submitted,

THE STATE OF MONTANA
Michael T. Greely*
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

THE STATE OF
NORTH DAKOTA
Nicholas J. Spaeth*
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

THE STATE OF
SOUTH DAKOTA
Roger A. Tellinghuisen
Attorney General of South Dakota
GIBSON DUNN & CRUTCHER
Charles J. Meyers*
1801 California Street,
Suite 4200
Denver, Colorado 80202
(303) 298-7200

THE STATE OF WYOMING
Joseph B. Meyer*
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

*Counsel of Record